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No. _____

Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1991

CONSOLIDATED BEEF INDUSTRIES, INC., individually and as a fiduciary under the C.B.I., INC. PENSION PLAN,

Petitioner,

v.

NEW YORK LIFE INSURANCE COMPANY and NEW YORK LIFE INSURANCE AND ANNUITY CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a lack of available remedies under ERISA is a material consideration in determining if Congress intended particular state laws and claims to be preempted?

2. Whether ERISA preemption extends to and immunizes an insurer from any liability to an employer that suffers damages as a result of purchasing the insurer's defective "turnkey" 401(k) program?

3. Whether ERISA permits a cause of action for damages against a non-fiduciary who has conspired with an ERISA fiduciary to breach fiduciary duties owed to plan beneficiaries?

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In the
Supreme Court of the United States
October Term, 1991

No.
Consolidated Beef Industries, Inc.,
individually and as a fiduciary under
the C.B.I., Inc. Pension Plan, Petitioner,

v.

New York Life Insurance Company
and New York Life Insurance and
Annuity Corporation, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Consolidated Beef Industries, Inc. ("CBI"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this matter.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, A16-A25) is reported at 949 F.2d 960. The opinion of the district court (App., infra, A1 - A15) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1991. (App., infra, A16.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1001 (App., infra, A50).
29 U.S.C. § 1109 (App., infra, A52).
29 U.S.C. § 1132(a)(3) (App., infra, A53).
29 U.S.C. § 1144(a) (App., infra, A54).
Wis. Stat. § 100.18(1) (App., infra, A55).

STATEMENT

In 1985 many corporate executives were learning from media coverage at the time that the benefits to employers of 401(k) plans[1] had no offsetting disadvantages, except that they were complicated and required compliance with government regulation. The specter of tax reform in 1986 made executives anxious to create these benefit programs before the new law altered their tax benefits. Regardless of their business acumen, corporate executives who wanted to install such a program were forced to rely on those who purported to have expertise in employee benefit plans. Certain insurance companies and banks were entities which marketed the necessary expertise.

This action arises out of a contractual relationship between CBI and NYL.[2] Early in 1985, CBI sought to provide a pension benefit plan to its employees. CBI was

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[1] A profit sharing program containing a "cash or deferred arrangement" pursuant to Section 401(k) of the Internal Revenue Code of 1986.

[2] "NYL" refers collectively to respondents New York Life Insurance Company and New York Life Insurance and Annuity Corporation.

solicited by NYL agent Rob Billings to institute a "turnkey" 401(k) program which would include communication to employees about the plan, its operation and investments, enrollment of employees, official 401(k) plan documents, IRS approval of the plan, and the use of two investment vehicles: (1) annuities from NYL and (2) qualified universal life insurance policies from North American Life and Casualty Company (hereinafter "NALAC"). Plan administration services by Pension Planners of North America (hereinafter "PPNA"), a NALAC subsidiary, were also to be included in the program.

The 401(k) turnkey program offered to CBI was one of the first of its kind offered as a result of a joint venture between NYL and NALAC. NYL had actively sought a partner with whom to market 401(k) programs that would utilize NYL annuities and the partner's unisex qualified universal life product and plan administration. NYL did not have a unisex qualified universal life product itself and it would have been prohibitively expensive for NYL to develop one. NALAC had that product and, through PPNA, plan administration capabilities, but it did not have its own agents working solely for the company. NYL had its own agents who could market the products of both companies. Thus, NALAC was a perfect joint venture partner for this project.

NYL's role was to provide personnel to sell the program, and NYL developed and supervised a training program for agents to sell the NYL/NALAC "401(k) turnkey program." The marketing effort by NYL agents specifically included plan administration services from PPNA. Prior to entering the joint marketing program, NYL did no investigation into NALAC/PPNA's experience in administering medium-sized plans in which two investment vehicles were used. The NYL employee responsible for seeking an appropriate joint venture partner for NYL was not experienced in 401(k) plans or their operation. NYL insulated itself from any responsibility for its creation of

the program, a program that was doomed from the outset to experience serious operational difficulties because the program used individual annuity policies for each employee participant in the group of people instead of one group annuity policy. (App., infra, A26-A31).

When the marketing venture commenced, personnel from both NYL and NALAC presented the turnkey program to NYL sales agents in a series of workshops held throughout the country. The agents heard scripted speeches introducing them to a "unique turnkey package for 401(k) plans . . . one that provides you with everything you need to sell large amounts of life insurance and annuities using efficient mass merchandising techniques . . . a package that will benefit you directly through immediate compensation . . . on 401(k)- sales . . . a package that will allow you to get into the market quickly without need to be a technical expert on qualified plans." NYL's Program Notebook contained the following description of the product that would be sold to employers:

> The NYL/NALAC 401(k) program will have its own Turnkey Plan which will be distinct from any other turnkey offered by NALAC. As such, the NYL/NALAC plan will be unique in that it will have its own fee schedule and will be offered only by NYL agents through the NALAC Regional Sales Offices and administered by NALAC and Pension Planners of North America (PPNA).

In 1985, Rob Billings met with CBI officers to sell them NYL's 401(k) turnkey program. Billings identified himself as an agent for NYL. The concept was presented as a NYL/NALAC program providing complete, ongoing assistance. Billings impressed CBI management with the multitude of benefits such a program could provide. He

explained how he would educate employees and recruit them to join the plan. He told CBI that he would take care of the enrollment process and all of the initial paperwork. He told CBI that NYL would provide plan documents and obtain IRS approval for the plan. He told them how much interest would be earned on NYL annuities. Billings represented that plan operation would be economical and that very little CBI employee time would be required to service it. CBI dealt exclusively with NYL agent Billings before, during and after installation of the 401(k) program and looked to Billings and NYL, as the "sponsors" of the program, for assistance and ultimate responsibility for its success or failure.

No options were offered to CBI with respect to the investment vehicles (NYL annuities and NALAC life insurance) or the plan administration (PPNA). CBI relied totally on Billings and had no independent retirement plan advisor. CBI entered into the agreement with the understanding that the entire package was sponsored by NYL. CBI relied on Billings' representation that NYL had created a program that complied with the complex set of rules governing 401(k) plans. No independent contract ever existed between CBI and the designated plan administrator, PPNA.

Billings held enrollment meetings with CBI employees in Green Bay, Wisconsin, and Huron, South Dakota, in October and November 1985. CBI employees were told that each participant would receive an annual statement of personal benefits. CBI employees were told of provisions for making hardship withdrawals, but were not told that NYL would assess surrender charges if any withdrawals were made.

After the enrollments were completed, NYL for the first time presented plan documents to CBI on December 5, 1985. These contractual documents were executed long after CBI had agreed to use the NYL turnkey program, long after NYL's presentations to, and enrollment of, CBI

employees, and long after the sale by Billings of the annuity and life insurance policies used in the plan. Moreover, CBI did not receive its own copies of plan adoption and plan documents from NYL until June 1986.

CBI purchased this program from NYL in order to provide CBI employees with a workable and useful 401(k) program. The purpose of implementing the program was to encourage goodwill toward the company and to provide long-term retirement benefits on a tax effective basis for CBI employees. CBI relied on the representations of NYL's agent in purchasing the program. CBI relied upon Billings' misrepresentations to CBI and its employees that NYL's program was a quality product that would benefit both employer and employee, that the "turnkey" plan would be competently operated, and that the NYL program was an appropriate type of 401(k) plan for CBI and its employees.

Almost from the first day the so-called "turnkey" 401(k) package sold by NYL revealed problems, which included:

- Incorrect interest rates credited on annuity contracts;
- Late crediting of plan contributions;
- Inaccurate billing;
- Lack of information for CBI personnel describing the plan and its proper operation;
- No plan description;
- No brochures or information for plan participants on how the plan operated;
- Delayed IRS approval;
- No annual statements to plan participants that accurately reflected contributions and accrued earnings; and
- Surrender charges assessed on annuities and insurance without prior notice to the terminating employees who were surrendering

them or to the employees seeking hardship withdrawals.

In response to numerous complaints, Billings attempted, but made little or no progress, in correcting most of the problems. Correct interest rates were not acknowledged until 2 1/2 years after installation of the plan, late crediting of contributions occurred for six months, annual statements were late and inaccurate, and plan documents arrived approximately nine months after plan implementation. After problems arose with withdrawals, NYL informed CBI and its employees that surrender charges were standard and that CBI should have been aware of them. NYL acknowledged that failure to properly credit interest was a NYL responsibility, but NYL denied responsibility for any other problem, claiming the plan documents NYL had drafted placed all such responsibility with its co-venturers, NALAC and PPNA.

The problems experienced by CBI were caused in part by NYL's failure to correctly credit interest, which made it impossible to produce correct annual statements for plan participants. Moreover, the use of individual annuity policies in a plan covering numerous employees was an inherent defect which was certain to lead to disaster. (App., infra, A26-A31) CBI principals were in no position to predict that the NYL turnkey program was inherently defective. Without ERISA expertise and by virtue of the fact that CBI was not provided with plan documents until nine months after sale of the program by NYL, CBI was not in any position to correct these numerous problems.

CBI's purchase and operating decisions were based on advice from NYL. CBI relied on NYL and Billings' promises to correct the program that NYL created and sold to CBI. Nevertheless, problems persisted from late 1985 through June 1988, at which time CBI terminated the NYL/NALAC program.

CBI then initiated this lawsuit. CBI alleged, as employer, that NYL misrepresented the quality and characteristics of the 401(k) program NYL promised to implement for the benefit of CBI's employees, breached the contract to provide said 401(k) program, breached implied warranties, and violated the Wisconsin trade practices law against fraudulent representations, Wis. Stat. § 100.18. CBI also alleged that NYL violated the fiduciary provisions of ERISA. (See Complaint, App., infra, A32).

After partial completion of discovery, defendants filed a motion for summary judgment in September 1989. On November 2, 1989, the district court granted the motion. (App., infra, A1). Pursuant to Fed. R. Civ. P. 54(b), the court ordered that no just reason for delay existed and directed entry of final judgment in accord with the November 1989 Order. (App., infra, A14). CBI appealed the dismissal of its claims to the Eighth Circuit. The Eighth Circuit affirmed the district court's ruling that all of CBI's state law causes of action were preempted by ERISA and that no cause of action existed under ERISA because NYL was not a fiduciary within the meaning of ERISA. (App., infra, A15).

REASONS FOR GRANTING THE PETITION

1. Lack of ERISA Remedies as Factor in Preemption Analysis.

The Court of Appeals' adoption of a broad definition of ERISA preemption in conjunction with a narrow definition of ERISA fiduciary has the effect of creating absolute legal immunity for NYL. Nevertheless, the Eighth Circuit held:

> [W]hether NYL is a fiduciary under ERISA or not does not affect our preemption analysis, and we hold CBI's state law claims are pre-empted by ERISA.

(App., infra, A21). Such a result is clearly in conflict with at least two other circuit courts of appeal and in contravention of the Congressional purpose of encouraging employers to adopt such plans for employees.

Many courts have recognized the conflict that exists between 29 U.S.C. § 1109 and 29 U.S.C. § 1144(a) and have reached a result which provides some form of action to a wronged party. See, e.g., Consumer Benefit Ass'n v. Lexington Ins. Co., 731 F. Supp. 1510, 1516 (M.D. Ala. 1990). Specifically, the Eighth Circuit's ruling that whether NYL is a fiduciary under ERISA does not affect ERISA preemption analysis is in clear conflict with the holdings of the Fifth Circuit in Memorial Hosp. Sys. v. Northbrook Life Ins. Co., 904 F.2d 236, 248 n.16 (5th Cir. 1990) and the Sixth Circuit in Perry v. P*I*E Nationwide, Inc., 872 F.2d 157, 162 (6th Cir. 1989) (preemption should apply to a state law claim only if Congress has provided a remedy for the wrong asserted), cert denied, 493 U.S. 1093 (1990).[3] The Eighth Circuit's ruling is in accord with the rulings of the Seventh Circuit, see Lister v. Stark, 890 F.2d 941, 946 (7th Cir. 1989) ("[T]he availability of a federal remedy is not a prerequisite for federal preemption"), and with decisions out of the Ninth and Eleventh Circuits. See Gibson v. Prudential Ins. Co., 915 F.2d 414, 417-18 (9th Cir. 1990);

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[3] See also Greenblatt v. Budd Co., 666 F. Supp. 735, 742 (E.D. Pa. 1987) ("it would defy logic to presume that Congress intended to preempt the common law action of fraud in a situation of this type"); Southern California Meat Cutters Unions v. Investors Research Co., 687 F. Supp. 506, 507-10 (C.D. Cal. 1988) (discussing conflict and finding no preemption); Quigley v. UNUM Life Ins. Co., 688 F. Supp. 80, 83 (D. Mass. 1988) (breach of contract and misrepresentation claims that posed no threat of inconsistent or conflicting state regulation of ERISA plans not preempted).

Howard v. Parisian, Inc., 807 F.2d 1560, 1564 (11th Cir. 1987).[4]

The court of appeals' rulings on this issue also detrimentally impact upon the Congressional purpose of affording broad remedies under ERISA. The Congressional history of ERISA is well documented. Congress could not have, by any conceivable stretch of the imagination, intended to create absolute immunity for third party insurance companies who sell inherently defective 401(k) programs to employers or for any other person who provides plan-related services or provides plan-related products. See Memorial Hosp. Sys., 904 F.2d at 248.

There must be some remedy. Otherwise, the Congressional intent of providing protection to plans and employees (see, 29 U.S.C. § 1001(b)) will be completely thwarted by a construction of ERISA that insulates from liability and responsibility any third party provider such as an attorney who assists in preparation and counseling with respect to a plan, an accountant who performs an annual plan audit, an actuary who calculates a plan's compliance with funding standards or, as in this case, an insurance company that sells a defective 401(k) program.

The divergence of the circuits on this issue and the inherent risk to plan sponsors that will develop in dealing with third party providers merits review by the Court. In

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[4] Other courts have broadened the definition of fiduciary to ensure that wronged individuals have some form of action for the type of claims raised by CBI. In Eaton v. D'Amato, for example, the court found that consultants and advisors were fiduciaries, stating:

> Applying a restrictive judicial gloss to the term "fiduciary" itself would, in effect enable trustees to transfer important responsibilities to a largely immunized "administrative" entity. A clear congressional desire to expand the scope of fiduciary standards of conduct should not be so undermined.

Eaton v. D'Amato, 581 F. Supp. 743, 746 (D.D.C. 1980).

addition, this Court can eliminate the uncertainty facing employers who seek to install employee benefit programs but may have no remedy if their seller provides a defective program. Considering that damages for failure to comply with regulations include the loss of tax benefits to plan participants, the potential of having to refile tax returns for all participants, IRS expense and tremendous accounting expense, employers ought to have some remedy against those who provide defective programs.

This issue merits review by the Court.

2. Preemption of Claims Arising from Sale and Implementation of Plan.

To eliminate the threat of conflicting or inconsistent state or local regulation of employee benefit plans, Congress enacted a preemption clause., codified at 29 U.S.C. § 1144(a), which provides:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

Id.

The court of appeals ruled that CBI's state law claims of violation of the Wisconsin trade practices law, misrepresentation, breach of contract, and breach of warranties "relate to" an employee pension plan and therefore are preempted under ERISA. The court of appeals held that ERISA preemption extends beyond claims

for benefits by plan participants to claims arising prior to installation of a plan. (App., infra, A20-A21). The Eighth Circuit followed Farlow v. Union Cent. Life Ins. Co., 874 F.2d 791, 794 (11th Cir. 1989), which also held that claims arising from the sale and implementation of a plan were preempted.

Although the Court has addressed the extent of ERISA's coverage on several occasions, see generally Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987), the courts of appeal and district courts continue to render inconsistent decisions in this area. The Court has emphasized that the preemption provision must be interpreted and applied with a "common sense view of the matter." Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985); see Pilot Life, 481 U.S. at 47. "Some state actions may affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." Shaw v. Delta Airlines, Inc., 463 U.S. 85, 100 n.21 (1983).[5]

Typical state law claims arising out of a contract--such as claims for "unpaid rent" and "failure to pay creditors" are relatively commonplace and, although obviously affecting and involving ERISA plans and their administration, are not preempted by ERISA § 514(a). Mackey, 486 U.S. at 833; see also Fort Halifax Packing v. Coyne, 482 U.S. 1, 6-7 (1977) (Maine statute requiring employer to provide one time severance payment to employees at time of plant closing not preempted). As noted by the Second Circuit:

> ERISA plan members and managers are bound to engage in myriad transactions

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[5] See also Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 833 (1988); (Georgia general garnishment statute not preempted); but see Ingersoll-Rand Co. v. McLendon, ___ U.S. _____, 111 S. Ct. 478 (1990) (wrongful discharge claim preempted); FMC Corp. v. Holliday, _____ U.S. _____, 111 S. Ct. 403 (1990) (application of state motor vehicle financial responsibility law to self-funded plan preempted).

> that Congress never considered when it drafted § 514 [29 U.S.C. § 1144]. A preemption provision designed to prevent state interference with federal control of ERISA plans does not require the creation of a fully insulated legal world that excludes these plans from regulation of any purely local transaction.

Rebaldo v. Cuomo, 749 F.2d 133, 138 (2d Cir. 1984), cert. denied, 472 U.S. 1008 (1985).

In Fort Halifax, the Court indicated that regulatory uniformity is the paramount concern:

> It is thus clear that ERISA's pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.

482 U.S. at 11 (citations omitted); see also Ingersoll, ____ U.S. at _____, 111 S. Ct. at 484; FMC Corp., _____ U.S. at _____, 111 S. Ct. at 408. Upon this rationale, the Fifth and Sixth Circuits and several district courts have held that disputes between parties to a sale of a 401(k) program, arising from representations prior to implementation of the plan, do not impact on this area and are not preempted.

See Memorial Hosp., 904 F.2d at 245-48; Perry, 872 F.2d at 161-62.

NYL provided more than merely a plan or insurance policies. NYL sold to employers, including CBI, a program that included employee solicitation, plan documents, insurance policies, annuities, administration, ongoing advice and troubleshooting. The crux of CBI's claims related to preplan misrepresentations and inducement to purchase a 401(k) program that had inherent defects. (App., infra, A26-A31). The Eighth Circuit relied upon Farlow v. Union Cent. Life Ins. Co., 874 F.2d 791 (11th Cir. 1989). The standards and rulings of the Eighth Circuit in this case and the Eleventh Circuit in Farlow are in direct conflict with other circuits concerning preemption of claims for misrepresentation surrounding the sale and implementation of a plan. See Perry; Memorial Hospital; Chicago Bd. of Option Exch. v. Connecticut Gen. Life, 713 F.2d 254 (7th Cir. 1983); Quigley v. UNUM Life Ins. Co., 688 F. Supp. 80 (D. Mass. 1988), aff'd, 887 F.2d 258 (1st Cir. 1989); Greenblatt v. Budd Co., 666 F. Supp. 735, 742 (E.D. Pa. 1987); see also Morning Star v. Melier, Inc., 662 F. Supp. 555 (E.D. Mich. 1987); McNamee v. Bethlehem Steel Corp., 692 F. Supp. 1477 (E.D.N.Y. 1988). As the Fifth Circuit stated in Memorial Hospital, "[C]ourts are more likely to find that a state law relates to a benefit plan if it affects relations among the principle ERISA entities--the employer, the plan, the plan fiduciaries, and the beneficiaries--than if it affects relations between one of these entities and an outside party, or between two outside parties with only an incidental effect on the plan." Memorial Hosp., 904 F.2d at 249; see also Pilot Life, 481 U.S. at 56-57 (finding an employee's claims for benefits preempted while recognizing a Congressional "expectation that a federal common law of rights and obligations under ERISA-regulated plans would develop"). The danger of extending ERISA preemption to third party marketers of 401(k) plans is readily evident.

It is inconceivable that a law, ERISA, that is intended to encourage employers to maintain employee benefit plans by establishing a uniform set of rules to govern the relationship between the plan and participants and the standard of conduct by plan fiduciaries, should be extended to insulate from liability the experts upon which an employer must necessarily rely in its operation of the plan. In the same type of relationship with which an employer is accustomed to dealing with suppliers of goods and services, if the product happens to relate in any manner to an employee benefit plan, the employer would apparently be forced to resort to such devices as escrow arrangements or letters of credit to protect itself. Such "encouragement" to employers must be inconsistent with ERISA's fundamental intent. The application of ERISA preemption to preplan misrepresentations and third parties is clearly raised in this matter. The issue should be reviewed by the Court because of the continued inconsistent application of preemption principles by the circuit courts of appeal and to ensure that extension of the preemption doctrine does not "run counter to one of Congress's overriding purposes in enacting ERISA." Memorial Hospital, 904 F.2d at 248.

3. Non-fiduciary Liability.

Although the typical third party administrator is not a plan fiduciary because its functions are purely ministerial, in this case the third party administrator, PPNA, became a fiduciary because of the defective design of the package. No one at CBI had any experience in the operation of benefit plans and there were no guidebooks, operating instructions or plan documents provided until long after the plan was installed. From the beginning all advice about regulatory compliance, plan operation, funding vehicles and administrative detail came to CBI through PPNA or Rob Billings. Part of the sales pitch had been that CBI would not need specially trained employees and would not spend

much staff time administering the plan. The only way that could have been accomplished was to put the burden on PPNA. The result was that PPNA had and exercised fiduciary discretion, and thus functioned as an ERISA fiduciary.

NYL and Billings directly participated with NALAC and PPNA in developing a program that would be marketed and provided to customers as a complete 401(k) package. The package was developed pursuant to a joint venture between New York Life and NALAC. Thus, because of NYL's knowing participation, conspiracy and/or joint venture with PPNA (a plan fiduciary), Consolidated Beef is entitled to proceed against NYL as a non-fiduciary under 29 U.S.C. § 1132.

There is a well recognized split of authority among the circuits on the precise issue of whether a non-fiduciary may be held liable for conspiracy with, or knowing participation in, the breach of fiduciary duties by an ERISA fiduciary. Cases from the Second, Third, Fifth, Sixth, Seventh, and D.C. Circuits have all held that a non-fiduciary may be subject to liability under ERISA. See Lowen v. Tower Asset Management, Inc., 829 F.2d 1209, 1220-21 (2d Cir. 1987); Whitfield v. Lindemann, 853 F.2d 1298, 1303 (5th Cir. 1988), cert. denied, 490 U.S. 1089 (1989); Brock v. Hendershott, 840 F.2d 339, 342 (6th Cir. 1988); Pappas v. Buck Consultants, Inc., 923 F.2d 531, 541-42 (7th Cir. 1991); Thornton v. Evans, 692 F.2d 1064, 1078 (7th Cir. 1982); Fink v. National Savs. & Trust Co., 772 F.2d 951, 958 (D.C. Cir. 1985) (dicta); Foltz v. U.S. News & World Report, 627 F. Supp. 1143, 1167-68 (D.D.C. 1986); Dole v. Compton, 753 F. Supp. 563, 567-68 (E.D. Pa. 1990) (discussing split of authority among circuits); Pension Fund--Mid Jersey Trucking Indus. Local 701 v. Omni Funding Group, 731 F. Supp. 161, 176-77 (D.N.J. 1990) (discussing same).

The Ninth, Tenth, and Eleventh Circuits have ruled that such a cause of action does not exist under ERISA.

See Nieto v. Ecker, 845 F.2d 868, 873 (9th Cir. 1988); Settles v. Golden Rule Ins. Co., 927 F.2d 505, 510 (10th Cir. 1991); Useden v. Acker, 947 F.2d 1563, 1579-80 (11th Cir. 1991) ("As a result of the circuits' selective attention to [Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 149 (1985)], a split in authorities has arisen."). While purporting not to express an opinion on the validity of non-fiduciary liability, the Eighth Circuit refused to recognize CBI's non-fiduciary claims in this matter.[6] The clear split of authority among the circuits on this issue of non-fiduciary liability warrants review by the Court.

This matter is similar to Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629, 641 (W.D. Wis. 1979), which is among the cases holding that a person who knowingly participates in a breach of trust under ERISA can be held liable under ERISA even though not a fiduciary. See id. at 641-42.

> While only fiduciaries can violate the fiduciary responsibility provisions of Title I of ERISA, it does not follow from that fact that relief may be awarded only against the breaching fiduciaries. In view of the expressed Congressional intent in enacting ERISA "to make applicable the law of trusts", the Court is fully empowered to award the relief available in traditional trust law against non-fiduciaries who knowingly participate, either directly or through an agent, in a breach of trust.

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[6] To the extent the Court of Appeals engaged in fact finding to reach this conclusion, CBI intends to raise those issues should the Court grant Certiorari on this issue. Rule 14.1.(a).

Id. In determining whether to allow an action against non-fiduciaries, "[t]he guiding principle should be to enforce the remedy which best carries out the purposes of the plan and is most advantageous to the participants and beneficiaries of the plan." Id. at 643. The Freund court's reasoning and conclusion demonstrate the sound basis upon which most courts have allowed such a cause of action under circumstances similar to those suffered by CBI.

This issue merits review by the Court.

CONCLUSION

There continues to be a split in the circuit courts of appeal as to whether the lack of an available ERISA remedy is a material factor in ERISA preemption analysis. The circuit courts of appeal have continued to adopt varying and conflicting rules and analyses with respect to ERISA preemption. The Eighth Circuit's preemption rulings in this matter depart from the rulings of this Court and are inconsistent with other circuits. The large number of third party providers such as lawyers, accountants, actuaries and plan marketers who obtain legal immunity through the anomalous result in this case warrants a close look at the impact of interpreting ERISA preemption too broadly.

A well-recognized split of authority among the circuit courts of appeal exists as to whether ERISA permits an action for damages against a non-fiduciary who has conspired with an ERISA fiduciary to breach fiduciary duties owed to plan beneficiaries. This question is

important and has not yet been addressed by the Court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

ELIZABETH H. MARTIN
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Attorneys for Petitioner

STATEMENT REQUIRED BY RULE 29.1

Through a name change, Consolidated Beef Industries, Inc. is now known as American Foods Group, Inc. There are no subsidiaries other than wholly owned subsidiaries. The stock of American Foods Group, Inc. is owned by C.K. Holdings, Ltd.

United States District Court
District of Minnesota
Third Division

Consolidated Beef Industries, Inc., individually and as a fiduciary under the C.B.I., Inc. Pension Plan,

Plaintiff,

v.

New York Life Insurance Company and New York Life Insurance and Annuity Corporation,

Defendants.

Civil File No. 3-88-0442

MEMORANDUM AND ORDER

Elizabeth Hoene Martin, Esq., Doherty, Rumble and Butler, P.A., 2800 Minnesota World Trade Center, 30 East 7th St., St. Paul, MN 55101, for plaintiff.

Gary J. Haugen, Esq., and Wayne S. Moskowitz, Esq., Maslon, Edelman, Borman and Brand, 1800 Midwest Plaza, Minneapolis, MN 55402, for defendants.

This matter is before the court upon defendants' (NYL's) motion for summary judgment, which asserts that plaintiff's (CBI's) state-law claims are pre-empted under the Employee Retirement Income Security Act of 1974 ("ERISA") and that CBI has failed to establish a cause of action under ERISA. For the reasons stated below, NYL's motion is granted.

FACTS

This action arises out of an employee pension benefit plan CBI adopted for its employees in 1985. The plan was a 401(k) "turnkey" plan providing both annuities and life insurance policies. The annuities were NYL's products, but the life insurance policies were from North American Life and Casualty (NALAC). Under the plan documents adopted in 1985, a NALAC subsidiary was to serve as the plan administrator. Because CBI seeks to hold NYL liable for damages caused by problems with the plan, NYL's role in both the creation and administration of the plan is crucial to the result here.[1]

In 1985, NYL sought a partner with which it could market 401(k) plans, needing a partner to provide both plan administration and unisex universal life insurance. NYL subsequently determined that NALAC was able to fill this role, and the two companies entered into a "memorandum of understanding" to jointly market and provide such plans. NYL was to provide personnel to NALAC's regional sales offices for purposes of selling and marketing 401(k) plans featuring both NYL annuities and NALAC life insurance.

In 1985, insurance agent Rob Billings met with CBI officers and presented the plan according to the above features. Billings identified himself as an agent for NYL. CBI ultimately agreed to implement the plan, and although the plan documents indicated that CBI as plan fiduciary "hired" the NALAC subsidiary to administrate the plan, CBI's officers entered into the agreement with the understanding that Billings was selling an entire package sponsored by the NYL.

Billings subsequently presented the plan to CBI employees, selling both annuities and life insurance

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[1] This factual discussion presents the submissions of the parties according to summary judgment standards' in the light most favorable to the non-moving party (CBI) according to CBI's showing beyond mere allegations in the pleadings. *See* Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 242 (1986).

policies for use in the plan. Billings provided application materials and information and told the participants that they'd receive an annual statement of benefits.

CBI alleges that a great many problems occurred with the plan shortly after its adoption, including incorrect interest rates on annuity contracts, late crediting of plan contributions, inaccurate billing, no manual for CBI personnel describing how to use the plan until June 18, 1986, no plan description, no brochures or information for plan participants on how to use the plan, delayed IRS approval, no annual statements to plan participants accurately stating the contributions and accrued earnings and, finally, surrender charges applied to both annuities being surrendered by terminating employees and employees making hardship withdrawals.

In response to complaints regarding the above problems, Billings made extensive efforts to solve the problems. NYL, moreover, acknowledged its responsibility to properly credit interest on annuity payments received and did so. NYL further advised CBI to change to a plan administrator different from the NALAC subsidiary, which CBI did. The alleged failure to properly credit annuity interest contributed to the plan administrator's failure to produce timely and accurate statements. CBI further asserts that NYL's agents (Billings and others) improperly allowed plan participants to make hardship withdrawals and this jeopardized the plan's tax exempt status with the IRS. Finally, CBI presents evidence that it followed Billing's advice in changing from one funding vehicle to another as well as in choosing investment vehicles for sums of money placed in the plan by CBI's principals.

In 1988 CBI decided to terminate NYL's annuities and the NALAC life insurance policies due to the many problems noted above. CBI now charges NYL with misconduct based on state law in the sale and implementation of the plan. CBI claims that the plan was destined to fail because a "turnkey" package providing both individual annuities and life insurance for a company

of CBI's size is virtually impossible to administrate, and seeks damages for money it contributed to the plan to cover losses on the annuities, the cost of hiring different plan administrators, the cost of amending the plan, lost personnel time, attorneys' fees and lost good will. CBI additionally seeks recovery for the plan from NYL and ERISA, claiming that NYL was a fiduciary.

In moving for summary judgment, NYL asserts that CBI's state-law claims are preempted under ERISA and that CBI has no ERISA claim against NYL because NYL was not a fiduciary under the plan.

DISCUSSION

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate where there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. Where the moving party identifies those portions of the pleadings and other relevant materials showing the absence of a genuine issue of material fact, the party opposing the motion has the burden of showing that a genuine issue exists. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986). The non-moving party may not rest upon the mere allegations of its pleadings, but must set forth specific facts demonstrating that there is a genuine issue for trial. *Celotex Corp.,* 477 U.S. at 324.

I. ERISA Preemption

The court concludes that CBI's state-law claims are preempted under ERISA. ERISA's preemption provisions states:

> [T]he provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan....

28 U.S.C. § 1144(a). More succinctly put, state laws are preempted if they "relate to" an ERISA plan. *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 107 S. Ct. 1549, 1552

(1987). ERISA preempts claims that relate to benefit plans even "indirectly." *Metropolitan Life Ins. Co. v. Mass.*, 471 U.S. 724, 741 (1985). In *Pilot Life,* the most recent Supreme Court examination of the ERISA preemption issue, Justice O'Connor states: "a state law 'relates to' a benefit plan in the normal sense of the phrase, if it has a connection with or reference to such a plan." 107 S. Ct. at 1552.

The broad language of the preemption clause is rooted in Congress' goal of providing comprehensive and exclusive federal regulation of covered employee benefit plans. As Justice O'Connor notes:

> [T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. "The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did not intend to authorized other remedies that it simply forgot to incorporate expressly."

Pilot Life 107 S. Ct. at 1556 (quoting *Massachusetts Mutual Life Ins. Co. v. Russel,* 473 U.S. 134, 147 (1985)). "The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws." *Pilot Life,* 107 S. Ct. at 1557 (quoting legislative history). Given the extensive scope of ERISA's preemption provision, there is ample case law for the proposition that state-law claims by ERISA-plan beneficiaries alleging liability for the denial of benefits or the improper administration of

plan benefits are preempted. *See, e.g., Pilot Life,* 107 S. Ct. at 1558 (holding preempted plan participant's common-law breach of contract and tort claims for "improper processing of a claim for benefits"); *Dependahl v. Falstaff Brewing Corp.,* 653 F.2d 1228 (8th Cir. 1981) (holding preempted plan participants' common-law tortious interference with contract claim resulting from the termination of severance payments).

CBI attempts to distinguish this case from the more typical ERISA preemption cases in three respects: first, that ERISA preempts only claims for benefits by plan participants; second, that ERISA preempts only claims for benefits against plan fiduciaries; and third, that because the state law claims here are based on improper conduct in the implementation and sale of the plan prior to any errors in plan administration, the claims do not "relate" to the plan under the preemption provision. The court concludes that these purported distinctions do not place the state-law claims beyond the broad scope of ERISA preemption.

First, the weight of authority holds that ERISA preemption extends beyond claims by plan participants for benefits. In *Painters Welfare Fund v. Peat, Marwick, Main & Co.,* 10 E.B.C. 1503, 1509 (E.D. Pa. 1988), the court held preempted, *inter alia,* a plan trustee's breach of contract claim against a former plan administrator for "mismanagement and overcharges to the fund." In *Brock v. Self,* 632 F. Supp. 1509, 1518 (W.D. La. 1986), moreover, the court held preempted counterclaims by pension plan trustees against a pension plan service company alleging tortious conduct, fraudulent misrepresentations, and breach of contract. The *Brock* court stated that its holding "is consistent with the Congressional intent to reserve to a federal authority the sole power to regulate the field of employee benefit plans[.]" 632 F. Supp. at 1519. Cases relied on by CBI, on the other hand, are less persuasive. *Miller v. Lay Trucking Co., Inc.,* 606 F. Supp. 1326, 1333 (N.D. Ind. 1985), for example, held not preempted a state-law claim against an insurance company for "fraudulently

induc[ing] the plaintiff "to switch pension plans." But in so holding the court stated "the alleged fraudulent activities took place prior to any contract being entered into with Bankers Life *and do not directly affect the regulation* of the ERISA plan in this case." This language is at odds with subsequent Supreme Court holdings on the broad scope of ERISA preemption: *Pilot Life, supra,* 107 S. Ct. at 1552; *Metropolitan Life, supra,* 471 U.S. at 741. Similarly, in *Scott v. Gulf Oil Corp.,* 754 F.2d 499, 1504-05 (9th Cir. 1985), the court held not preempted claims by ex-employees alleging the coercive denial of "prospective benefits" which in effect "prevented the existence" of a benefit plan. The court's holding in *Scott* was premised on analysis of "whether the conduct challenged by each claim was part of the administration of an employee benefit plan." 754 F.2d at 1505. This narrow language is also at odds with the subsequent Supreme Court cases. Additionally, *Scott* is distinguished on the facts because this case *does* involve, by reference, the alleged improper administration of an existing plan. If the plan were properly administered, CBI would have no claim.

Second, ERISA preemption is not limited to claims against ERISA fiduciaries. *See Amer. Fed. of Unions v. Equitable Life Assur. Soc.,* 841 F.2d 658, 666 (5th Cir. 1988) (holding preempted state-law negligence claims against a non-fiduciary insurance company); *Settles v. Golden Rule Ins. Co.,* 715 F. Supp. 1021, 1023-24 (D. Kan. 1989) (holding preempted breach of contract, outrage, fraud, and wrongful death claims of beneficiary's widow against non-fiduciary insurance company). Cases relied on by CBI, *Munoz v. Prudential Ins. Co. of America,* 633 F. Supp. 564, 571 (D. Colo. 1986), and *So. Cal. Meat Cutters Unions v. Investors Research,* 687 F. Supp. 506, 507-10 (C.D. Cal. 1988) (quoting *Freeman v. Jacques Orthopaedics,* 721 F.2d 654 (9th Cir. 1983)), conclude that ERISA's failure to regulate non-fiduciaries means it does not preempt claims against non-fiduciaries. These cases do not give appropriate weight to the broad statutory preemption language and do not consider Justice

O'Connor's reminder in *Pilot Life, supra,* that Congress intended to "help administrators, fiduciaries, and participants to predict the legality of proposed actions without the necessity of referring to state laws," 107 S. Ct. at 1557, and "did not intend to authorize other remedies that it simply forgot to incorporate expressly." 107 S. Ct. at 1556.

Third, the court concludes that CBI's state-law claims are preempted despite the fact that they relate to conduct prior to the formation of the plan. As noted above, the claims necessarily relate to errors in administration of the plan; otherwise there would be no damages and thus no claims. This conclusion is bolstered by the court's holding in *Farlow v. Union Cent. Life Ins. Co.,* 874 F.2d 791, 793-96 (11th Cir. 1989). There the court held preempted beneficiaries' misrepresentation and negligence actions against an insurance company arising out of the sale of the insurance. The court reasoned that because the alleged misconduct in selling the insurance was "intertwined" with the plaintiffs' failure to receive benefits, the claims "related to" the plan. 874 F.2d at 794. The *Farlow* holding is consistent with Congress' intent to "encourage the *formation* of employee benefit plans." *Pilot Life,* 107 S. Ct. at 1556 (emphasis added).

The court concludes, in sum, that CBI's state-law claims "relate to" the plan and thus are preempted in accordance with Congress' intent to establish an exclusive regulatory scheme in the area of employee pension plans.

II. Fiduciary Status Under ERISA

In addition to the state-law claims, CBI as a plan trustee seeks to hold NYL liable as a plan fiduciary under 29 U.S.C. § 1109(a), which provides as follows:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach,

and to restore to such plan any profits of such breach, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

* * *

ERISA further provides this pertinent definition of fiduciary:

Except as otherwise provided in subparagraph (B), a is a fiduciary with respect to a plan to th extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c) (1) (B) of this title.

28 U.S.C. § 1002(21) (A). The Department of Labor has promulgated the following regulations which further define "investment advice:"

(1) A person shall be deemed to be rendering "investment advice" to an employee benefit plan, within the meaning of section 3(21) (A) (ii) of the Employee Retirement Income Security Act of 1974 (the Act) and this paragraph, only if:

(i) Such person renders advice to the plan as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property; and

(ii) Such person either directly or indirectly (e.g., through or together with any affiliate) --

(A) Has discretionary authority or control, whether or not pursuant to agreement, arrangement

or understanding, with respect to purchasing or selling securities or other property for the plan; or

(B) Renders any advice described in paragraph (c)(1) (i) of this section on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

29 C.F.R. § 2510.3-21. Courts are to place a broad interpretation on the term fiduciary. *See, e.g., Mutual Life Ins. Co. of New York v. Yampol,* 840 F.2d 421 (7th Cir. 1988).

Here CBI asserts that because NYL was involved in more than the mere marketing of its annuities, it was a fiduciary to the plan. CBI presents, basically, the following factual showing in arguing that NYL was a fiduciary. NYL, through Billings, marketed a 401(k) "turnkey" plan featuring both NYL individual annuities and NALAC life insurance. NYL, through Billings, sold the annuities and the life insurance to CBI plan beneficiaries, paying Billings a commission. NYL profited from the sale of the 401(k) "turnkey" plan as a whole by selling more annuities than it otherwise could. Although the plan documents explicitly named CBI as fiduciary and the NALAC subsidiary as plan administrator by delegation from CBI, CBI principals were under the impression that NYL was in charge of the entire program. Billings spoke with CBI employees and recommended investing in the plan, providing pamphlets and information on the specific benefits involved. When administration problems ensued Billings attempted to solve the problems, and NYL

acknowledged responsibility to cure deficient interest credits in the annuities. Billings and other NYL agents made incorrect hardship annuity withdrawal decisions, and provided further advice in urging CBI to stay with the NYL annuities and to switch to a new plan administrator.

Viewing this factual showing favorably to CBI, the court still concludes that CBI has failed to present a material factual dispute on the fiduciary issue. First, the record does not reveal any NYL control or authority over plan management or plan assets. Billings' attempts to help solve problems never involved acts beyond suggestions. CBI, additionally, was never compelled to follow Billings' advice, and ultimately did not. CBI relies on *Monson v. Century Mfg.,* 739 F.2d 1293, 1303 (8th Cir. 1984), where the court held that a corporate officer who played a large part in the implementation of his company's plan and "had authority to make press releases without prior approval [by] the corporate officers named as fiduciaries" exercised discretionary control over the plan and thus was a fiduciary. This case is distinguishable. Insurance agent Billings, unlike the *Monson* corporate officer, did freely administer or control the plan. He sought to persuade the CBI officers named as fiduciaries. The *Monson* holding, moreover, was based on the fact that the particular corporate officer there was the only corporate officer who participated in the fraud to the plan not named as a plan fiduciary. *See Anoka Orthopaedic Associates, P.A. v. Mutschler,* 709 F. Supp. 1475, 1486 (D. Minn. 1989). CBI's reliance on *Miller v. Lay Trucking Co., Inc.,* 606 F. Supp. 1326, 1335 (N.D. Ind. 1985) is similarly unsuccessful. In *Miller,* the officer held to be a fiduciary performed the role of plan administrator, referred to himself as the plan administrator, and was "solely responsible for formulating the specifications of the proposed plan." *Id.* Here, the NALAC fiduciary served as plan administrator, a fact CBI knew despite its initial impression that NYL was selling an entire package. NYL did not refer to itself as a administrator and was not solely

responsible to the plan's specifications. CBI, to whom Billings made a number of sales pitches, was also responsible for the specifications. Similar analysis applies to any assertion that NYL had administrative authority. NYL actions regarding annuity interest and withdrawals were part of its annuity product.

Billings' sale of annuities and insurance, finally, did not constitute rendering investment advice for CBI under ERISA. Billings was selling annuities and insurance, not making discretionary investment decisions. The crucial distinction lies in the source of payment. *See American Federation of Unions v. Equitable Life Assurance Society,* 841 F.2d 658, 664 (5th Cir. 1988) (advice by sales agent before he assumed duty of plan administrator for which he received commissions from insurance company -- and nothing from the plan -- did not constitute investment advice for a fee under the statute); *Farm King Supply, Inc. Integrated Profit Sharing Plan and Trust v. Edward D. Jones and Co.,* 884 F.2d 288, 293 (7th Cir. 1989); *Trustees of Dupage County Plumbers and Pipe Fitters Local 514 Retirement Plan v. The Banker's Life Co.,* No. 81-C-4885, slip op. (N.D. Ill. 1982). CBI would distinguish these cases on the grounds that here Billings, on behalf of both NYL and NALAC, sold both annuities and life insurance in a "turnkey" program and thus received "indirect" compensation from the plan. NYL clearly benefitted from the coupling of its product with the NALAC life insurance. But this is a distinction without a difference for purposes of fiduciary status. Billings received no payment from CBI or the CBI plan, represented NYL and NALAC in urging the purchase of their products, and received a commission from them -- just as in the cases noted above. Under the regulations, moreover, there is no evidence that Billings and CBI were operating under any agreement that he would provide "regular" investment advice.

The facts before the court do not show that NYL and its agent had any control over the CBI plan or its investments, that NYL had an arrangement with the CBI plan to

provide investment advice, or that NYL had discretionary administrative powers. NYL, as a matter of law, was not an ERISA fiduciary. As noted above, CBI's state-law claims are preempted. Accordingly, IT IS ORDERED that:

Defendant's motion for summary judgment is GRANTED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: November 2, 1989.

Paul A. Magnuson
United States District Court Judge

United States District Court
District of Minnesota
Third Division

Consolidated Beef Industries, Inc., individually, and as a fiduciary under the C.B.I., Inc. Pension Plan,

Plaintiff,

v.

New York Life Insurance Company and New York Life Insurance and Annuity Corporation,

Defendants.

File No. 3-88-442

ORDER

Based upon the stipulation of counsel and upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that, pursuant to Fed. R. Civ. P. 54(b), the Court expressly determines that there is no just reason for delay on entry of a final judgment and expressly directs the entry of a final judgment (1) dismissing Plaintiff's Complaint in accordance with the Memorandum and Order filed November 2, 1989, and (2) denying Defendants' motion for attorney's fees in accordance with the Memorandum and Order filed January 12, 1990.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Paul A. Magnuson
United States District Judge

Dated: January 26, 1990

United States District Court
District of Minnesota
Third Division

Consolidated Beef Industries, Inc., individually and as a fiduciary under the C.B.I., Inc. Pension Plan,

Plaintiff,

v.

New York Life Insurance Company and New York Life Insurance and Annuity Corporation,

Defendants.

Civil File No. 3-88-447

ORDER

The above matter came on before the undersigned by motion pursuant to Federal Rule of Appellate Procedure 4(a)(5) of plaintiff Consolidated Beef Industries, Inc. for an extension of the time for appeal in the above-captioned matter.

Having considered the motion of the plaintiff and the affidavit in support thereof, and being fully advised in the premises,

IT IS HEREBY ORDERED that the time for appeal from the court's Order and Entry of Judgment filed January 29, 1990, dismissing plaintiff's Complaint and granting judgment in favor of defendants, is hereby extended for thirty (30) days from the date of this Order.

BY THE COURT:

Paul A. Magnuson
United States District Judge

Dated: March 12, 1990

United States Court of Appeals
For The Eighth Circuit

Nos. 90-5131/5164

Consolidated Beef Industries, Inc., individually, and as a fiduciary under the C.B.I., Inc. Pension Plan,

Appellant/Cross-appellee,

v.

New York Life Insurance Company; New York Life Insurance and Annuity Corporation,

Appellee/Cross-appellant.

Appeals from the United States District Court for the District of Minnesota

Submitted: December 12, 1990
Filed: November 19, 1991

Before McMILLIAN and FAGG, Circuit Judges, and ARNOLD,* District Judge.

McMILLIAN, Circuit Judge.

Consolidated Beef Industries, Inc. (CBI), appeals from a final order entered in the United States District Court[1] for the District of Minnesota, granting summary judgment in

* The Honorable Morris S. Arnold, United States District Judge for the Western District of Arkansas, sitting by designation.

[1] The Honorable Paul A. Magnuson, United States District Court for the District of Minnesota.

favor of New York Life Insurance Company and New York Life Insurance and Annuity Corporation (collectively New York Life or NYL). The district court held that the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 *et seq.* (ERISA), pre-empted CBI's state law claims alleging misrepresentation, breach of contract and implied warranties, and fraudulent representation and that, as a matter of law, NYL was not an ERISA fudicicary.[2] For reversal, CBI argues the district court erred in holding that (1) its state law claims were pre-empted by ERISA and (2) NYL and its agent, Robert Billings, were not fiduciaries under ERISA. NYL cross-appeals the district court's denial of its motion for attorney's fees[3] claiming that the denial of attorney's fees was an abuse of discretion. For the reasons discussed below, we affirm both the district court's grant of summary judgment and denial of attorney's fees.

FACTS

In early 1985, an agent of NYL solicited CBI to provide, for CBI's employees, a § 401(k) "turnkey" plan, which included annuities from NYL and life insurance policies from North American Life and Casualty Company (NALAC). The § 401(k) turnkey program was one of the first of its kind and was the result of a joint venture between NYL and NALAC. NYL's role involved providing the personnel to sell the program and developing training programs with respect to the § 401(k) plan. Pension Planners of North American (PPNA), a NALAC subsidiary, was to provide the plan administration services.

CBI was solicited by NYL agent Robert Billings. Billings had a special agreement with another NYL agent, Frank Likas, whose son was a co-owner of CBI, whereby Likas

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[2] *Consolidated Beef Indus., Inc. v. New York Life Ins. Co.*, Civil File No. 3-88-0442 (D. Minn. Nov. 2, 1989) (order granting summary judgment).

[3] *Id.* (Jan. 11, 1990) (order denying motion for attorney's fees).

received a certain percentage of the commission on Billings' sales to CBI. Billings informed CBI that he would handle the enrollment process and all of the initial paperwork. He additionally told CBI that NYL would provide the documents for the § 401(k) plan and obtain IRS approval. CBI dealt exclusively with Billings during the installation of the § 401(k) plan and had no independent retirement advisor. Billings solicited employees to join the § 401(k) plan and earned commissions on each annuity and life insurance policy that he sold under the plan. Participation in the plan was voluntary and all contributions came from CBI employees.

On December 5, 1985, after the enrollments were completed, NYL presented CBI will the plan documents. CBI did not, however, receive its own copies of the documents. CBI did not, however, receive its own copies of the documents until June of 1986. These documents define the "Plan Administrator" as the "named fiduciary appointed by the Employer (CBI) to administer this Plan." CBI named itself as the Plan Administrator and its vice-president of finance as the plan's Trustee. The plan documents contain an agreement whereby PPNA was hired to administer the plan.

Almost from the beginning, problems arose surrounding the administration of the § 401(k) plan. These included incorrect interest rates on annuity contracts, late crediting of plan contributions, inaccurate billing, lack of information on use of the plan and its operation, delay in obtaining IRS approval, lack of annual statements, and surrender charges on termination and hardship withdrawals. NYL acknowledged responsibility for the improperly credited interest rates, but denied responsibility for all other problems. Upon the advice of NYL, CBI later changed the plan administrator from PPNA to DCA, Inc. The problems continued and, in June 1988, CBI terminated NYL's annuities and NALAC's life insurance policies.

In July 1988, CBI filed suit against NYL alleging state law claims for breach of contract, breach of implied

warranties of fitness and merchantability under the Uniform Commercial Code, statutory and common law misrepresentation, breach of fiduciary duty, and negligent failure to train and supervise agents. CBI also asserted a claim for breach of fiduciary duty under ERISA, 29 U.S.C. § 1109(a). On November 2, 1989, the district court granted NYL's motion for summary judgment finding that CBI's state law claims were pre-empted by ERISA and that, as a matter of law, NYL was not an ERISA fiduciary. CBI appeals from this judgment. On January 11, 1990, the district court denied NYL's motion for attorney's fees. NYL cross-appeals from this order.

GRANT OF SUMMARY JUDGMENT

We review a grant of summary judgment de novo. The question before the district court, and this court on appeal, is whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see, e.g., Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-50 (1986).

A. Pre-emption

For reversal, CBI first argues that the district court erred in finding its state law claims pre-empted. ERISA contains a broad pre-emption provision:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a). "The pre-emption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that 'relate[s]

to' an employee benefit plan governed by ERISA." *FMC Corp. v. Holliday,* 111 S. Ct. 403, 407 (1990); *see Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 47 (1987). The Supreme Court has defined "'relate[s] to' a benefit plan 'in the normal sence of the phrase, if it has a connection with or reference to such a plan.'" *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 739 (1985), *quoting Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 97 (1983) (*Shaw*). Yet the Court admits that "[s]ome state actions may affect employee benefit plans in too tenous, remote, or peripheral a manner" to be pre-empted. *Shaw,* 463 U.S. at 100 n.21.

Given ERISA's broad pre-emption provision, state law claims for improper plan administration are pre-empted. *See Dependahl v. Falstaff Brewing Corp.,* 653 F.2d 1208 (8th Cir.), *cert. denied,* 454 U.S. 968, 1084 (1981) (*Dependahl*). CBI argues that its claim is distinguishable from *Dependahl* because its claim arises from NYL's pre-plan actions. Specifically, CBI argues that its claims arise out of the purchase of the § 401(k) plan and not the administration of plan and, therefore, they are "too tenuous and remote" to be pre-empted by ERISA. CBI alleges that its case is similar to *Mackey v. Lanier Collection Agency & Serv., Inc.,* 486 U.S. 825 (1988) (Mackey). In *Mackey*, the Supreme Court found that Georgia's general garnishment statute was not pre-empted while the antigarnishment statute which specifically referred to ERISA was pre-empted. *Id.* at 830-31. Thus, the Court allowed Georgia to permit the garnishment of ERISA funds. CBI also points to *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1 (1987) (*Fort Halifax*), as a case where ERISA pre-emption was rejected. *Fort Halifax* involved a Maine statute which required employers to provide a one-time severance payment to employees at the time of a plant closing. The Supreme Court found that this did not relate to any employee benefit plan under ERISA. *Id.* at 7.

The facts of the instant case are clearly distinguishable from these decisions. CBI's claims, such as inaccurate billings, incorrect interest rates and lack of accurate

annual statements to plan participants, arise directly from the administration of the plan. CBI attempts to argue that NYL should have foreseen these difficulties and thus its claims arose pre-plan and are not pre-empted. This assertion is simply not supported by the record because CBI's primary concern is whether the plan was properly administered. Additionally, even if CBI's claims involved misrepresentation in the sale of the § 401(k) program, its claims still relate to the employee benefit plan. *See Farlow v. Union Cent. Life Ins. Co.,* 874 F.2d 791, 794 (11th Cir. 1989); *Childers v. Northwest Airlines, Inc.,* 688 F. Supp. 1357, 1364 (D. Minn. 1988). Thus CBI's claims "relate to" an employee benefit plan and therefore are pre-empted.

CBI further argues that in order for a state law claim to be pre-empted, there must an ERISA remedy available. Because, as discussed below, the district court found that NYL was not a fiduciary under ERISA, CBI is left with no ERISA remedy. CBI asserts that *Dependahl* stands for the proposition that a state law claim is pre-empted when Congress intended to occupy the field and Congress has provided a remedy. While *Dependahl* does state those two factors as the reasons for finding pre-emption, *Dependahl,* 653 F.2d at 1215, the case does not stand for the proposition that both factors are always necessary. The Ninth Circuit points out that because ERISA allows equitable relief against both fiduciaries and non-fiduciaries, Congress intended pre-emption to apply even where no ERISA fiduciary remedy existed. *Gibson v. Prudential Ins. Co.,* 915 F.2d 414, 417-18 (9th Cir. 1990); *accord Howard v. Parisian, Inc.,* 807 F.2d 1560, 1564 (11th Cir. 1987). Thus whether NYL is a fiduciary under ERISA or not does not affect our ERISA pre-emption analysis, and we hold CBI's state law claims are pre-empted by ERISA.

B. NYL's Status as a Fiduciary Under ERISA

CBI next argues the district court erred in finding that NYL is not a fiduciary under ERISA. CBI asserts three theories as to why NYL is a fiduciary under ERISA: (1)

Billings, NYL's agent, acted as a plan fiduciary through his control over plan assets and investment advice for a fee; (2) NYL is a fiduciary by virtue of its duty to exercise due care in training and supervising its employees; and (3) NYL, even if not technically a plan fiduciary, remains liable because it participated in a breach of trust under ERISA. ERISA defines a plan fiduciary as follows:

> Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he [or she] exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he [or she] renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he [or she] has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21) (A). The term fiduciary is to be broadly construed and a person's title does not necessarily determine if one is a fiduciary.

CBI first alleges that Billings exercised discretionary control and rendered investment advice for a fee thus making him a plan fiduciary. CBI asserts that it relied heavily on the advice of Billings so that a factfinder could find Billings had authority or control over the plan assets. Further, CBI claims that his advice is "rendering investment advice for a fee" as defined in 29 C.F.R. § 2510.3-21(c). CBI's claim is based on Billings' marketing and selling the § 401(k) plan. CBI alleges that Billings made more commissions by selling the § 401(k) plan because he was able to sell more annuities than he otherwise could have. Additionally, Billings recommended the change in plan administrator.

The record does not support these assertions. The plan documents explicitly name CBI as fiduciary and PPNA as

plan administrator. Both of CBI's claims are based upon the "investment advice" given by Billings because it was through this advice that CBI alleges Billings exercised control over the management of the plan. However, Billings was not providing investment advice, but was instead selling his company's financial products. He recommended CBI purchase NYL's "products" and received commissions for these sales. These commissions were the only fees which Billings received. Billings' involvement in the plan was substantially less than that of the defendant Weber in *Monson v. Century Mfg. Co.*, 739 F.2d 1293 (8th Cir. 1984) (*Monson*). The agent defendant in *Monson* was held to be a fiduciary because he had worked on the amendments to the plan, met with company's independent accountant, "consulted on plan investments and had the authority to make some press releases without [the owner's] prior approval." *Id.* at 1303. Billings had no such power. Additionally, Billings' role was substantially different from the agent in *Miller v. Lay Trucking Co.*, 606 F. Supp. 1326 (N.D. Ind. 1985), who was found to be a fiduciary because he performed the role of a plan administrator, signed documents as the plan administrator, and was responsible for choosing among several plans. *Id.* at 1335. Billings did not recommend which stocks to invest in as did the stockbroker who was found to be a fiduciary under ERISA in *Stanton v. Shearson Lehman/American Express, Inc.*, 631 F. Supp. 100, 102-04 (N.D. Ga. 1986) (*Stanton*). Billings was merely a salesperson earning commissions and not a fiduciary under ERISA. *See American Fed'n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assur. Soc'y*, 841 F.2d 658, 664-65 (5th Cir. 1988).

Second, CBI asserts that NYL is liable as a direct fiduciary, even if Billings is not a fiduciary. CBI's claim is based upon NYL's duty to exercise due care in the training and supervising of its employees. CBI relies on *Stanton*, 631, F. Supp. at 105, for this assertion. While we do not adopt the reasoning in *Stanton*, the brokerage firm retained to handle the ERISA funds was considered a

fiduciary because its unsolicited recommendations to invest in certain securities were blindly followed by the plan trustee. *Id.* NYL had no such control over CBI's ERISA funds. NYL simply sold CBI annuities; it did not recommend specific investments beyond its products.

Third, CBI asserts that NYL has non-fiduciary liabillity. Relying on *Freund v. Marshall & Ilsley Bank,* 485 F. Supp. 629 (W.D. Wis. 1979) (*Freund*), CBI asserts that a person who knowingly participates in a breach of trust under ERISA can be held liable under ERISA even though not a fiduciary. This court expresses no opinion on the validity of non-fiduciary liability because even under the standards in *Freund,* CBI has not proven NYL is liable as a non-fiduciary. CBI has not shown that NYL participated in a breach of trust with an ERISA fiduciary. CBI claims that NYL developed a defective § 401(k) plan in conjunction with NALAC and PPNA. The mere marketing of the § 401(k) plan does not implicate fiduciary conduct, nor has CBI proven that the § 401(k) plan was actually defective, only that it was administered poorly. NYL was not involved in the administration of the plan or any breach of trust that may have occurred in the administration of the plan.

Therefore, we affirm the district court grant of summary judgment for NYL.

CROSS-APPEAL FOR ATTORNEY'S FEES

NYL cross-appeals the district court's denial of its motion for attorney's fees. The district court found that NYL had "not established the requisite lack of merit to prevail on the attorney's fee motion." *Consolidated Beef Indus., Inc. v. New York Life Ins. Co.,* Civil File No. 3-88-0442 (D. Minn. Jan. 11, 1990) (order denying motion for attorney's fees). NYL argues that the district court should have awarded it attorney's fees under ERISA, 29 U.S.C. § 1132(g)(1), which states: "In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its

discretion may allow a reasonable attorney's fee and costs of action to either party." NYL contends that CBI's lawsuit was protracted, expensive and unnecessary, and that CBI acted unreasonably in rejecting all efforts at resolving their dispute without litigation.

This court's standard of review of an order awarding or denying attorney's fees is abuse of discretion. *Gunderson v. W.R. Grace & Co. Long Term Disability Income Plan,* 874 F.2d 496, 500 (8th Cir. 1989) (*Gunderson*). NYL argues that the district court should apply the "prevailing plaintiff" standard established in *Gunderson* and *Landro v. Glendenning Motorways, Inc.,* 625 F.2d 1344 (8th Cir. 1980) (*Landro*), to "prevailing defendants." Under that standard, "[a] prevailing plan beneficiary or participant 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" *Gunderson,* 874 F.2d at 500, *quoting Landro,* 625 F.2d at 1356. We express no opinion on the appropriate standard for a prevailing defendant, but even under the "prevailing plaintiff" standard, the district court did not abuse its discretion in denying NYL's motion for attorney's fees. CBI's claims were serious and involved complicated legal issues that were sufficiently debatable to justify plaintiff's pursuit of the claims, and therefore an award of attorney's fees would be unjust.

Accordingly, we affirm both the district court grant of summary judgment and the order denying NYL attorney's fees.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States District Court
District of Minnesota
Third Division

Consolidated Beef Industries, Inc., individually, and as a fiduciary under the C.B.I., Inc. Pension Plan,

Plaintiff,

v.

New York Life Insurance Company and New York Life Insurance and Annuity Corporation,

Defendants.

File No. 3-88-442

AFFIDAVIT OF MARC MOSIMAN

STATE OF MINNESOTA)
) SS.
COUNTY OF HENNEPIN)

MARC MOSIMAN, being duly sworn upon oath deposes and states that:

1. I am employed as the President at DCA, a business which provides pension plan administration services to employers, among other endeavors. I have 22 years of experience in the administration of pension plans, including 401(k) plans. I make this affidavit is support of Plaintiff's Memorandum In Opposition To Defendant's Motion For Summary Judgment.

2. DCA provided plan administration services for Consolidated Beef Industries pension plan after Pension Planners of North America had provided administration services. In the course of providing those services, I became personally familiar with the provisions of the plan, the funding vehicles for the plan, the data from the

insurance companies which provided the funding vehicles (New York Life and Annuity Corporation and North American Life and Casualty) and I dealt with a number of individuals employed by each insurance company and by CBI.

3. Based upon my experience in the industry, my review of the Consolidated Beef Industries' plan and the problems that had developed prior to DCA providing administrative services, as well as problems that persisted during the time DCA provided these services, I have an opinion about the cause of the problems. Administration problems were caused in large part because individual annuity contracts were used. Plan administration problems are predictable if individual annuity contracts are going to be used in a plan with more than just a few participants. In the case of Consolidated Beef Industries, it was predictable that there would be a myriad of administrative problems that would result in dissatisfaction by the employer and plan participants as well as potential negative tax consequences.

4. Basically, individual annuity contracts do not work in 401(k) plans although there are now certain new contracts that tend to avoid some of the more predictable problems. Certainly in 1985 when the CBI plan was installed, one of the predictable major problems was use of individual annuity contracts. 401(k) plans involve "group rules" such as discrimination testing and reporting to the government on the status of the group. 401(k) plans are designed to be flexible to accommodate groups of employees. In order to operate smoothly, flexibility must be built in to the plan's funding vehicles. The problem arises because insurance companies' individual annuity contracts traditionally have no flexibility. Insurance companies process both life insurance and annuity contracts such as those offered by New York Life for the CBI plan individually. For instance, underwriting is individual and crediting interest is by individual contract. These processes are in conflict with how 401(k)'s operate. Another example is that crediting periods may conflict with plan years. 401(k)

"plan years" are not necessarily calendar years. For purposes of the plan there is no concern about what the contributions are until an accounting period for the plan ends (when discrimination testing must be done and 5500 reports filed). To the contrary, insurance companies often credit interest only on calendar quarters which may conflict with the plan year.

Another example is that insurance companies bill monthly for premiums for both annuities and universal life. They expect a level amount of contribution throughout the year. 401(k)'s do not operate that way so the insurance companies' rules conflict. If an employee goes on a leave of absence for three months and discontinues his contributions to the plan, he is still a participant in good standing but his life insurance might lapse in the meantime because of the lack of flexibility in billing. Plan contributions vary based on whether the participants are hourly workers (as with CBI), whether there are seasonal changes in the work force and/or total work hours vary. In my opinion New York Life could have predicted the administration problems that were experienced with the CBI plan and those problems would have existed without regard to the fact that interest rates were misquoted. The problems could only have been avoided by changing the product from individual to group annuities and/or by changing company policies and data systems to provide the flexibility 401(k) plans need. 401(k)'s can easily accommodate such variations but the lack of flexibility in individual annuities does not.

A collection of individual annuities simply does not make a flexible plan. The record keeping for individual annuities at New York Life and other carriers does not lend itself to the record keeping required for 401(k) plans where group totals are necessary. If there is no system in place at the insurer to provide group data, the plan adminstration task is made even more difficult. New York Life did not have systems and policies in place in 1985 to provide the flexibility that 401(k) plans need to operate.

5. In the case of CBI, another reason there were

administration problems was the failure by New York Life to credit plan participants with the correct amount of interest the New York Life agent has promised plan participants. New York Life's records reflected a lower interest rate than what I am told their agent had promised. Annual statements prepared for each plan participant are supposed to reflect the correct amount of interest accrued on the investment vehicles. As a result of New York Life's failure to credit the correct amount of interest commencing with contributions to the plan in 1985 and continuing through the period when DCA performed administration services, there were continuing problems with administration as a direct result.

6. Prior to the time that DCA took over administration services on the CBI plan, I was familiar with the operations of Pension Planners of North America ("PPNA"). I was familiar with the business which PPNA conducted with regard to the size of plan administered, the relative sophistication of the plans, and the number of plan participants on an average. I became familiar with these facts in the course of investigating whether DCA would take over PPNA's business. I observed that PPNA handled approximately ten larger sized plans (meaning 200 or more employees) and there were problems with all of them. All of them involved funding vehicle combinations of life insurance and individual annuity contracts. PPNA had so much trouble trying to administer them it was forced to decide to cancel those ten clients. Ultimately, DCA took over the PPNA operation. Given the size of the CBI plan, it was predictable by anyone who understood 401(k) plans that PPNA or any administrator would have difficulty administering the plan.

FURTHER AFFIANT SAITH NOT.

_____

Marc Mosiman

Subscribed and sworn to before me
this 28th day of September, 1989.
Sandra Melberg

United States District Court
District of Minnesota
Third Division

Consolidated Beef Industries, Inc., individually, and as a fiduciary under the C.B.I., Inc. Pension Plan,

Plaintiff,

v.

New York Life Insurance Company and New York Life Insurance and Annuity Corporation,

Defendants.

File No. 3-88-442

AFFIDAVIT OF JAMES D. COULOMBE

STATE OF WISCONSIN)
(ss
COUNTY OF BROWN)

James D. Coulombe, being first duly sworn on oath deposes and states as follows:

1. I am the Vice President of Finance of American Foods Group, Inc., f/k/a Consolidated Beef Industries, Inc..

2. I make this affidavit in support of Consolidated Beef Industries, Inc.'s ("CBI") Memorandum In Opposition To The Defendants' Motion For Summary Judgment.

3. In the summer and fall of 1985, CBI did not employ any separate, independent business consultants or financial advisors regarding the installation of a retirement plan at CBI or any of the services or funding vehicles that might be associated with such a plan. New York Life agent, Rob Billings, advised that Consolidated Beef Industries institute a 401(k) plan and advised CBI

regarding annuity contracts for the 401(k) pan he was suggesting, including features of specific types of annuities. Mr. Billings recommended one annuity in particular. CBI relied upon Mr. Billings' advice.

4. Mr. Billings and/or another New York Life agent or employee recommended that CBI replace its plan administrator, PPNA, with DCA. CBI relied upon Mr. Billings' advice.

5. Mr. Billings' advice regarding instituting a retirement plan as a turn key program only included using two funding vehicles: individual annuities and qualified universal life insurance. Mr. Billings did not advise CBI regarding other possible funding vehicles for the 401(k) plan. He did not present other options.

FURTHER AFFIANT SAITH NOT.

_____

James D. Coulombe

Subscribed and sworn to before me
this 27th day of September, 1989.

Sally J. Vande Hei
Notary Public, Brown County, WI
My commission expires: 6/23/91

United States District Court
District of Minnesota
Third Division

Consolidated Beef Industries, Inc., individually, and as a fiduciary under the C.B.I., Inc. Pension Plan

Plaintiff

vs.

New York Life Insurance Company and New York Life Insurance and Annuity Corporation,

Defendants.

File No._____

COMPLAINT

For its complaint herein, plaintiff Consolidated Beef Industries, Inc., individually, and as a fiduciary under the C.B.I., Inc. Pension Plan (hereinafter "CBI") states and alleges as follows:

PARTIES

1. Plaintiff CBI is a Delaware corporation with its principal place of business in Green Bay, Wisconsin. Plaintiff is in the business of meat and seafood packing and marketing. Plaintiff's subsidiaries include Huron Dressed Beef in Huron, SD, Green Bay Dressed Beef in Green Bay, WI, Dakota Pork Industries, Inc., headquartered in Minneapolis, MN with operations in South Dakota and Iowa, and Weinstein International Corp., headquartered in Minneapolis, MN. CBI is a citizen of the state of Wisconsin. Plaintiff acts here in its individual capacity and as a fiduciary under the Employee Retirement Income Security Act of 1974 ("ERISA").

2. New York Life Insurance and Annuity Corporation is a Delaware corporation with its principal place of business in New York City, NY. New York Life Insurance Company is licensed under the laws of the state of New York and has its principal place of business in New York City, NY. Upon information and belief, both New York Life Insurance Company and New York Life and Annuity Corporation are licensed to do business in many states, including Wisconsin, Minnesota and South Dakota. Both New York Life Insurance Company and New York Life Insurance and Annuity Corporation are citizens of the state of New York.

JURISDICTION AND VENUE

3. The jurisdiction of this Court is invoked under both 28 U.S.C. § 1332 on grounds that the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs and is between citizens of different states and 29 U.S.C. §1132.

4. Venue is founded upon 28 U.S.C. § 1391.

FACTUAL BACKGROUND

5. Upon information and belief, New York Life Insurance Company or New York Life Insurance and Annuity Corporation entered into a joint venture with North American Life and Casualty Company ("NALACC') through which NYL marketed cash or deferred profit sharing plans and trusts, also known as 401(k) plans which had been drafted by NALACC. Upon information and belief, NYL also agreed to market a turnkey program for operating a 401(k) plan including plan documents, communications, investment vehicles and administration, that is, services of a third party to administer the plan, which would serve to generate business for Pension Planners of North America ("PPNA"), a division of NALACC (hereinafter "turnkey program").

6. Upon information and belief, NYL sought to vastly increase the market for its annuity contracts by offering

them as investment vehicles for use in 401(k) plans.

7. Upon information and belief, NYL also agreed to market NALACC life insurance policies as investment vehicles under the 401(k) plans.

8. Upon information and belief, prior to its joint venture with NALACC, NYL had been in the business of administering pension and profit sharing plans, but had discontinued said business. NYL had sufficient experience in the administration of such plans to understand the needs of customers purchasing the plans with respect to the administration that would be necessary and the potential problems that could develop.

9. Upon information and belief, NYL knew that federal statutes and regulations govern profit sharing plans and that thorough knowledge of said statutes and regulations, in addition to knowledge of the rules of the plan itself, is necessary for NYL agents to properly market turnkey programs and the investment vehicles used in the 401(k) plans.

10. Upon information and belief, NYL knew or should have known that NYL agents required special training to become competent to provide information and services to customers purchasing turnkey programs. Upon information and belief, NYL knew or should have known that its agents required supervision to competently market and service the turnkey programs including advice about investment vehicles for 401(k) plans.

11. Defendants, through their agents, met in Wisconsin with officers of plaintiff for purposes of selling plaintiff a turnkey program. Representations made by defendants' agents included, among others, that a "menu" of investment options would be available under the 401(k) plan; that there would be no monthly charge to participants except for a small initial enrollment fee; that the 401(k) plan worked like a savings account so that there was no penalty for withdrawals, and that there would be a tax benefit to plaintiff for participation. Defendants emphasized the importance of plaintiff taking action before year end to take advantage of then current tax law

in the event tax reform legislation would prevent establishment of 401(k) plans in the future.

12. Defendants, through their agents, met with employees of plaintiff and its subsidiaries in Wisconsin and South Dakota for purposes of inducing them to contribute to a 401(k) plan and to investment vehicles for the plan.

13. Defendants through their agents knew or should have known that Plaintiffs' payroll schedule was weekly and that contributions to the Plan would be made through wage withholding.. Defendants through their agents knew or should have known that premiums for investments or charges associated with administration would be calculated as "monthly" figures which would thus create apparent inconsistencies in payments and which would require special attention and planning by all parties to avoid confusion in plan administration.

14. Defendants represented to plaintiff that the plan administration by PPNA was the only assistance plaintiff needed to administer the Plan.

15. Plaintiff relied upon representations by Defendants' agents in allowing PPNA to administer its Plan.

16. NYL agents also advised plaintiff in its capacity as Plan Administrator to purchase NALACC life insurance policies as investment vehicles for participants in the plan. Employees of plaintiff and its subsidiaries were led by defendants to believe that there were tax benefits to investment in the Plan and that life insurance was required as one of the two investment options in the Plan. In reliance upon defendants' representations plaintiff purchased NALACC life insurance policies for Plan participants. Applications for insurance were completed inaccurately by defendants agents and NALACC agents. The agents knew or should have known that participants would be considered to have taxable income.

17. In late 1985, in reliance upon representations of defendants, plaintiff bought a turnkey program for operating a 401(k) plan. The name of the plan is C.B.I., Inc. Pension Plan (hereinafter "the Plan"). Plaintiff and

two of its subsidiaries, Green Bay Dressed Beef and Huron Dressed Beef, are the three employers named in the plan. Plaintiff is designated as the Plan Administrator under the terms of the Plan. The Plan Administrator selects investment vehicles to be used in the plan. The effective date of the Plan is December 5, 1985.

18. Defendants' agents advised plaintiff in its capacity as Plan Administrator to purchase NYL individual annuity contracts for Plan participants and that NYL annuity contracts would earn no less than 10% interest during the first policy year. The "policy year" for each annuity contract is defined as the 12 calendar months following the commencement date of the policy.

19. Defendant and their agents knew or should have known that it is unusual to use individual annuity contracts in a 401(k) plan and they can create complex, extremely difficult administration problems. Defendants and their agents knew of should have known that investment vehicles under a 401(k) plan should contain provisions for withdrawal of funds without penalty by plan participants.

20. Defendants and their agents knew of should have known that group annuity contracts are more common for funding 401(k) plans and may provide higher investment returns and more flexibility.

21. In reliance upon the representations of defendant's agents, plaintiff purchased individual annuity contracts from defendants for Plan participants. Defendants' annuity contracts for participants in the Plan became effective on or about December 5, 1985. Thus, the first policy year for the annuity contracts under plaintiff's Plan ran from early December 1985 to early December 1986. The second policy year commenced in early December 1986 and ended in early December 1987.

22. In November, 1986, defendants' agent represented to plaintiff in its capacity as Plan Administrator that interest to be paid by NYL on the individual annuity contracts in the Plan for the second policy year would be

no less than 8 3/4 percent. In reliance upon this representation of defendants, plaintiff continued to contribute payments to NYL for annuity contracts.

23. Prior to sale of the turnkey 401(k) program, defendants knew or should have known that the administration of the 401(k) plan would create serious problems for staff of plaintiff in learning governmental regulations applicable to the plan as well as in financial recordkeeping and data processing for the participants in the plan.

24. Defendants and their agents knew or should have known that PPNA would not be competent to handle plaintiff's account and the promised turnkey plan administration. Upon information and belief, PPNA has never administered a plan of the size and complexity of plaintiff's.

25. Defendants represented to plaintiff that any help necessary for plaintiff to administer the turnkey program would be provided through written materials such as a "directions manual" provided by defendants and by help from the third party administrator.

26. Defendants knew or should have known that plaintiff in its capacity as Plan Administrator would need a "directions manual" or guideline describing the turnkey program, the Plan and how to administer them.

27. No written directions manual or guide was supplied by defendants to plaintiff.

28. In 1986, prior to the marketing and sale of certain multi-fund annuity contracts for plaintiff's 401(k) plan, defendants knew or should have known that the sale of multi-fund annuity contracts to plaintiff's most highly compensated personnel would affect whether the 401(k) plan remained qualified under government regulations and whether sales of said contracts would violate the rules of the plan itself. At the time of marketing of certain multi-fund annuity contracts to plaintiff's most highly compensated personnel, defendants' agents knew or should have known that the administration of the plan was in such a state of chaos that it would be impossible to

calculate whether purchase of said contracts would violate government regulations or the rules of the plan.

29. Despite their knowledge, defendants represented to plaintiff that it should arrange for its most highly compensated personnel to acquire large annuity contracts under the plan. In reliance upon said representations plaintiff as Plan Administrator bought multi-fund annuity contracts for its most highly compensated personnel.

30. The purchase of large multi-fund annuity contracts by plaintiff has jeopardized the qualification of the Plan or the tax status of plaintiff or the Plan participants.

31. As a direct result of the failure of defendants to supply a directions manual, the incompetence of the third party administrator, the misrepresentations of defendants and the actions of poorly trained agents, some of the problems plaintiff has with the turnkey program or investment vehicles are:

a. Deductions for service charges were made to individual participant's accounts.

b. Payments of premiums were credited by defendants weeks or months after the payments were sent.

c. Participants who terminated employment were charged surrender charges when they withdrew their funds from the annuity contracts.

d. Any Participants who made withdrawals from the annuity contracts were charged surrender charges.

e. No written directions manual or guide was supplied by defendants to plaintiff. As a direct result of the failure of defendants to supply a directions manual plaintiff encountered many problems in administering the Plan.

f. No accurate statements have been prepared for plan participants since the Plan's inception.

g. Insurance policy premiums were improperly recorded, causing participants to receive notices that their policies had lapsed.

h. Interest on annuity contracts was calculated inaccurately. Upon information and belief defendants credited 9% (instead of 10%) for the first policy year and 7 1/2%

(instead of 8 3/4%) for the second policy year.

i. Amounts of premiums paid for life insurance or annuity contracts were inaccurately recorded.

j. Plan and other documents were not provided for seven months after the Plan commenced.

k. An NYL agent assisted participants in seeking withdrawal of funds without informing them that hardship was a requirement for such withdrawal;

l. NYL made distributions from individual annuity contracts at request of NYL agents without proper authorization from the Plan trustee who owns the contract.

m. Participants discovered there were tax consequences from purchasing life insurance under the Plan;

n. Late reporting of W-2 income associated with the cost of life insurance caused participants to amend tax returns.

o. Participants discovered they had life insurance policies they did not want and did not ask to have.

p. Participants were led to believe they were required to invest in life insurance policies in order to obtain annuity contracts.

q. Difficulties for plaintiff's business office in administering the plan.

r. Possible disqualification of the plan.

32. The problems commenced in December, 1985 and most of them continue to the present time.

COUNT I

Breach of Contract

33. Plaintiff realleges each and every allegation contained in Paragraphs 5 through 32, all as if fully set forth herein.

34. Defendants promised a turnkey program plan and failed to provide it.

35. Defendants, through their agents, promised to pay interest at the rate of 10% for the first policy year

(December 1985 to December 1986) and 8 3/4% interest for the second policy year (December 1986 to December 1987) and failed to credit said interest to the participants' accounts.

36. Defendants breached their promise that no service fees would be charged to individual participants in the 401(k) plan.

37. Defendants breached their promise to provide a plan which would operate similar to a savings account into which participants pay premiums and earn interest and from which withdrawal can be made without penalty.

38. Defendants failed to properly credit each participants' premiums paid to the annuity contracts within a commercially reasonable time from the date of payment.

39. Defendants failed to properly credit interest to each participants' annuity contract.

40. As a result of defendants' breach of contract, plaintiff has sustained damages including, but not limited to, expenses connected with numerous hours of staff time devoted to the problems with the turnkey program; liability to Plan participants for reimbursement of premiums, interest, service charges and surrender charges; potential liability for tax consequences to participants in the event the Plan is disqualified, or in the event certain transactions under the Plan result in tax liability for some participants; tax liability of plaintiff in the event the plan is disqualified or certain transactions under the plan are deemed taxable; loss of good will with its employees arising from lost trust and confidence in plaintiff; administrative costs charged by third parties for dealing with the many problems under the turnkey program; attorneys' fees connected with attempting to correct problems and amending the 401(k) plan; and attorneys' fees connected with bringing this action.

COUNT II

Breach of Implied Warranty of Fitness for Particular Purpose

41. Plaintiff realleges the allegations contained in paragraphs 5 through 32, all as if fully set forth herein.

42. Defendants were informed of and had knowledge of the purpose for which the turnkey plan was to be used by plaintiff, and, at the time of said sale impliedly warranted the program to be fit and proper for such purpose pursuant to the Uniform Commercial Code section 2-315; specifically, that the turnkey program would provide tax advantages to plaintiff and the participants, that the administration of the 401(k) plan by PPNA would be efficient, accurate and would insure compliance with the various federal regulations governing 401(k) plans so that plaintiff would not be subject to liability, would benefit plaintiff in its relationship with its employees, would provide a vehicle by which participants could invest money and obtain a substantial return on the investment without penalty for withdrawal.

43. Defendants were informed and had knowledge of the purpose for which the turnkey program was purchased by plaintiff, and, at the time of said sale impliedly warranted the program to be fit and proper for such purpose.

44. Defendants were informed of and had knowledge of the purpose for which plaintiff sought investment vehicles in the 401(k) plan, and, at the time of the sale of annuity contracts for investment vehicles in the Plan impliedly warranted said annuity contracts to be fit and proper for use in a 401(k) plan; specifically, that individual annuity contracts for each participant in the Plan would provide a beneficial investment vehicle capable of efficient administration under the plan. Plaintiff agreed to purchase defendants' annuity contracts as investment vehicles under the 401(k) plan for the specific use as investment vehicles tailored for plaintiff's 401(k) plan.

45. The turnkey program was not fit for plaintiff's particular purpose. The plan administration was not fit for plaintiff's particular purpose. The annuity contracts were not fit for plaintiff's particular purpose. Defendants breached their implied warranty of fitness for particular purpose.

46. Defendants' breaches of implied warranty and fitness for use have caused plaintiff to sustain damages including, but not limited to, expenses connected with numerous hours of staff time devoted to correcting discrepancies under the 401(k) plan; liability to its employee-participants for reimbursement of premiums, interest, service charges and surrender charges; and potential liability for tax consequences to participants in the event the Plan is disqualified or in the event certain transactions under the Plan result in tax liability for some participants; tax liability of plaintiff in the event the Plan is disqualified or certain transactions under the Plan are deemed taxable; a deteriorating working relationship with its employees arising from lost trust and confidence in plaintiff; administrative costs charged by third parties for dealing with the many problems under the 401(k) plan; attorneys' fees connected with analyzing and amending the 401(k) plan; and attorneys' fees connected with bringing this action.

COUNT III

Breach of Implied Warrant

47. Plaintiff realleges the allegations contained in paragraphs 5 through 32, all as if fully set forth herein.

48. Defendants impliedly warranted to plaintiff, pursuant to the Uniform Commercial Code Section 2-314, that the turnkey program for operation of a 401(k) plan was merchantable and fit for the ordinary purposes for which such programs are used. Plaintiff relied on said warranty when purchasing the turnkey program. Plaintiff purchased the turnkey program for use for its ordinary purpose.

49. Defendants impliedly warranted to plaintiff that their individual annuity contracts were merchantable and fit for the ordinary purposes for which said contracts are to be used in a 401(k) plan and plaintiff relied on said warranty when contracting to use the annuity contracts as investment vehicles in the plan.

50. The terms of the annuity contracts sold by defendants and the fact that each contract was individual rather than one group contract rendered the turnkey program of unmerchantable quality and unfit for the ordinary purpose of a 401(k) plan. The lack of a directions manual, the complexity of the turnkey program, and the incompetence of the third party administrator also rendered the turnkey program unmerchantable and unfit for the ordinary purpose of such programs.

51. Defendants' breaches of implied warranty and fitness for use have caused plaintiff to sustain damages as set forth in paragraph 40 above.

COUNT IV

Deceptive Representations

Violation of Wisconsin Statute § 100.18

52. Plaintiff re-alleges each and every allegation contained in Paragraphs 5 through 32, all as if fully set forth herein.

53. Prior to December 5, 1985 defendants, through their agents, made representations to plaintiff including the following:

a. That the 401(k) plan would not involve any cost to the plan participants;

b. That individual annuity contracts were an appropriate investment vehicle for plaintiff to purchase for its plan;

c. That the interest rate to be earned during the first policy year on the individual annuity contracts would be 10%;

d. That defendant was providing plaintiff with a

turnkey program for operation of a 401(k) plan, one which was workable, manageable and effective;

e. That the turnkey plan administration through the services of PPNA would accurately and efficiently administer the Plan;

f. That the Plan would operate similarly to a savings account, without penalty (surrender charges) or restrictions on withdrawals from annuity contracts in the Plan.

54. Plaintiff relied on defendant's representations, which representations were made for the purpose of inducing Plaintiff to purchase the turnkey program plan from defendants and to offer to plan participants individual annuity contracts as investment vehicles under the plan.

55. Prior to December 5, 1986 defendants through their agent made representations to plaintiff that the interest rate to be earned during the second policy year of the individual annuity contracts would be no less than 8 3/4%. Said representation was made to induce plaintiff to continue making contributions to annuity contracts and to induce additional employees of plaintiff to enroll in the Plan and purchase annuities.

56. At the time defendants sold plaintiff the turnkey program for operation of a 401(k) plan defendants knew or should have known the following:

a. That the program actually involved a cost to plan participants;

b. That participants who terminated their employment would pay a penalty to leave the Plan in the form of surrender charges;

c. That the individual annuity contracts would yield interest at a rate of only 9% for the first policy year;

d. That the terms of the individual annuity contracts created a substantial disincentive to early withdrawal;

e. That the use of individual annuity contracts and of life insurance policies in the 401(k) plan would result in an unmanageable, unworkable and ineffective plan;

f. At the time defendants' agent made representations

to plaintiff regarding second policy year interest he knew or should have known that the individual annuity contracts would yield interest at a rate of only 7 1/2% for the second policy year.

57. Defendants' representations and defendants' failure to provide plaintiff with complete information regarding the plan constitute untrue, deceptive or misleading representations under Wis. Stat. § 100.18.

58. As a result of Defendant's violation of Wis. Stat. § 100.18, Plaintiff has been damaged as set forth in paragraph 40 above.

59. Plaintiff is entitled to recovery of its costs and attorneys fees pursuant to Wis. Stat. § 100.18(11)(b)(2).

COUNT V

Breach of Fiduciary Duty

60. Plaintiff realleges Paragraphs 5 through 32, all as if fully set forth herein.

61. Defendants created a fiduciary duty to plaintiff when they marketed and sold the turnkey program to plaintiff.

62. Defendants' failure to credit proper amounts of interest, defendants' failure to credit premium payments in a commercially reasonable time; defendants' sale of individual annuity contracts for the Plan rather than a single group annuity contract for all of the participants; defendants' failure to determine that plan administration by PPNA would be unsuccessful all constitute breach of fiduciary duty to plaintiff.

63. As a result of defendants' breach of fiduciary duty, plaintiff has been damaged as set forth in paragraph 40 above.

COUNT VI

Negligent Misrepresentation

64. Plaintiff realleges paragraphs 5 through 32, all as if fully set forth herein.

65. Prior to the marketing and sale of the turnkey program to plaintiff, defendants and their agents knew or should have known (1) that it is necessary for any employer such as plaintiff to have "directions manual" or guideline for administering the plan which should be made available to the employer immediately upon commencement of a plan; (2) that a third party administrator of the plan must have experience in similar plans, with similar sized employers and with similar investment vehicles in the plan in order for the administration to be successful; (3) that the rate of interest applicable to annuity contracts fluctuated and that NYL determines the applicable interest rate as of the date the premiums are first deposited rather than the applicable interest rate on the date the 401(k) plan and annuity contracts are marketed to a customer; and (4) that the individual annuity contracts and individual life insurance policies for each plan participant create a program that is extremely difficult to administer and which provides no additional benefits to participants than a group contract would provide.

66. Defendants representations were made to induce plaintiff to buy the turnkey program.

67. Plaintiff relied on the representations of defendants and its agents to its detriment.

68. Plaintiff has been damaged as set forth in paragraph 40 above.

COUNT VII

Violation of ERISA

69. Plaintiff realleges Paragraphs 5 through 32, all as if fully set forth herein.

70. Defendants are fiduciaries pursuant to ERISA, 28 U.S.C. § 1002 (21) by virtue of the investment advice rendered to Plaintiff.

71. Defendants breached their duties as fiduciaries to Plaintiff under 29 U.S.C. § 1109 by recommending investment vehicles that created penalties to plan

participants who terminate their employment and that contributed to administrative failures, and by recommending individual annuity contracts instead of a group annuity contract or contracts and by not taking appropriate steps to cause accurate annual statements to be produced for participants and proper administration to be undertaken by NALACC or others.

72. As a result of Defendant's breach of fiduciary duty, Plaintiff has been damaged as set forth in Paragraph 40 above.

73. Plaintiff is entitled to equitable relief, damages and attorneys' fees pursuant to 29 U.S.C. § 1109 and § 1132.

COUNT VIII

Failure to Train and Supervise Agents

74. Plaintiff realleges Paragraphs 5 through 32, all as if fully set forth herein.

75. Defendants failure to adequately train their agents with regard to 401(k) plans, the necessities for administration of such plans, the necessary features of investment options to be used in 401(k) plans, and the effect of the features of defendants' individual annuity contracts when used in a 401(k) plan.

76. Defendants failed to adequately supervise their agents with regard to advice agents gave to customers of 401(k) plans affecting the plan itself, adminstration of the plan, and investment options under the plan.

77. As a result of defendants' failure to adequately train and supervise their agents, plaintiff has been damaged as set forth in paragraph 40 above.

COUNT IX

Punitive Damages

78. Plaintiff realleges Paragraphs 5 through 32, all as if fully set forth herein.

79. The actions of defendants and their agents in the marketing and sale of the turnkey program and its failure

to correct the problems within a reasonable time after notice amounts to malicious, outrageous and wanton disregard of the rights of plaintiff, entitling plaintiff to punitive damages in accordance with applicable Wisconsin law.

WHEREFORE, plaintiff prays the order of this Court as follows:

1. Under Count VII of its Complaint, for an accounting of all NYL individual annuity contracts under the Plan with respect to contributions, service fees, interest, surrender charges and any other charges and for judgment in favor of Plaintiff and against Defendants for damages and attorneys' fees in an amount to be proven at trial;
2. Judgment in favor of plaintiff and against defendants for actual damages in an amount to be proven at trial;
3. Judgment in favor of plaintiff and against defendants for punitive damages in an amount to be proven at trial;
4. Judgment in favor of plaintiff and against defendants for costs, disbursements, reasonable attorney and witness fees in an amount to be proven at trial pursuant to Wisconsin Statute 100.18;
5. For such other and further relief as the Court deems just and equitable.

Dated: June 28, 1988

DOHERTY, RUMBLE & BUTLER, P.A.

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JURY TRIAL IS DEMANDED

28 U.S.C. § 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been repaid an substantial; that the operation scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of the participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provision in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before

requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be in the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

29 U.S.C. § 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

29 U.S.C. § 1132(a)(3). Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought —

* * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . .

29 U.S.C. § 1144(a) Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may not or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Wis. Stat. § 100.18(a). Fraudulent representations

(1) No person, firm, corporation or association, or agent or employee thereof, with intent to sell, distribute, increase the consumption of or in any wise dispose of any real estate, merchandise, securities, employment, service, or anything offered by such person, firm, corporation or association, or agent or employee thereof, directly or indirectly, to the public for sale, hire, use or other distribution, or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate, merchandise, securities, employment or service, shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, magazine or other pamphlet, letter, sign, placard, card, label, or over any radio or television station, or in any other way similar or dissimilar to the foregoing, an advertisement, announcement, statement or representation of any kind to the public relating to such purchase, sale, hire, use or lease of such real estate, merchandise, securities, service or employment or to the terms or conditions thereof, which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

Supreme Court, U.S.
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(2)

No. 91-1342

In the
Supreme Court of the United States
October Term, 1991

CONSOLIDATED BEEF INDUSTRIES, INC.,
individually and as a fiduciary under
the C.B.I., INC. PENSION PLAN,

Petitioner,

v.

NEW YORK LIFE INSURANCE COMPANY
and NEW YORK LIFE INSURANCE AND
ANNUITY CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals properly rule that purported state law claims relating to the administration of an ERISA plan are pre-empted even if no remedy is provided by ERISA?

2. Did the Court of Appeals properly rule that Petitioner's purported state law claims are pre-empted by ERISA because they relate to the administration of an ERISA plan?

3. Did the Court of Appeals properly rule that Petitioner had failed to make a proper showing under Rule 56 to support a claim for non-fiduciary liability under ERISA even if such a cause of action were cognizable?

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STATEMENT OF THE CASE

Respondents New York Life Insurance Company and New York Life Insurance and Annuity Corporation (collectively, "NYL") submit the following as an addition to the Statement of the Case found in the Petition for Writ of Certiorari of Consolidated Beef Industries, Inc. ("CBI").[1]

A. Background.

CBI sued NYL to recover damages allegedly resulting from administration problems CBI purportedly experienced with a 401(k) pension plan that it adopted for its employees in December 1985 (the "Plan"). CBI alleges that it entered into an oral contract with NYL to purchase a "turnkey program for operating a 401(k) plan," and that the Plan did not operate properly. Petitioner's Appendix ("Pet. App.") A-35-38. Based on the allegedly defective operation of the Plan, CBI asserted various state law claims and a claim for breach of fiduciary duty under ERISA.[2] Id. at A-46-47. CBI's state law claims and ERISA claim are all based on the same alleged conduct, and CBI seeks the same damages for each of its claims, including its purported ERISA claim. Id. at A-40, 42-43, 45-47.

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[1] Pursuant to Rule 29.1, Respondents state that New York Life Insurance Company is the parent company of New York Life Insurance and Annuity Corporation.

[2] CBI's state law claims allege, inter alia, that NYL breached a contract to provide a turnkey plan program (Pet. App. A-39); that the turnkey plan program breached implied warranties of fitness and merchantability under the UCC (Id. at A-41-42); that NYL misrepresented that the plan would be administered accurately and efficiently by PPNA (Id. at A-44-46); that NYL became a fiduciary to CBI by marketing and selling the plan program, and breached its fiduciary duty by failing to determine that PPNA's administration would be unsuccessful (Id. at A-45); and that NYL negligently failed to train and supervise its agents with regard to 401(k) plans and their administration (Id. at A-47). CBI also seeks punitive damages. (Id. at A-47.)

B. CBI's Principals.

When CBI adopted the Plan, its co-owners were Ronald Likas and Carl Kuehne. Ronald Likas was a former economic analyst and investment consultant for businesses, and he had for many years sold insurance products in the business market, along with his father, Frank Likas, who was a long-time agent for NYL. Eighth Circuit Joint Appendix ("8th Cir. App.") 90, 97, 123. Mr. Kuehne is an attorney who had represented CBI before purchasing the company. Id. at 82-84.

C. The NALAC/NYL Program.

In the spring of 1985, Frank Likas became aware of a new program regarding 401(k) retirement plans offered by NYL and North American Life and Casualty Company ("NALAC"). 8th Cir. App. 160. The details of this program were set forth in a Memorandum of Understanding between NYL and NALAC. Id. at 272.

According to the Memorandum of Understanding, agents who were licensed by both NYL and NALAC could market NYL individual annuities and NALAC life insurance policies for use as investment vehicles in 401(k) plans. Id. at § 1.5. The agents could also market the administrative services of Pension Planners of North America ("PPNA"), a division of NALAC. The provision of administration services was the exclusive province of NALAC/PPNA; NYL was precluded from acting as a plan administrator or fiduciary. Id. at §§ 1.1, 4.4, 15.3.

D. CBI Adopts a 401(k) Plan.

After reviewing materials regarding the program, Frank Likas told another NYL agent, Robert Billings, that

Billings should "enroll his son's company," i.e., CBI, in a 401(k) plan. They agreed that in return for doing the "leg work," Billings would receive 40% of the commissions, and Frank Likas would receive the remaining 60%. 8th Cir. App. 160-61, 163.

CBI adopted the Plan in December 1985. Id. at 244, 259. CBI appointed itself as the Plan administrator, and it hired PPNA to act as third-party administrator. Id. at 241, 244, 493-96; Pet. App. A-35-36. NYL is not mentioned anywhere in the Plan documents. NYL did not execute any written contracts with CBI or the Plan, except for the annuities it subsequently issued to the Plan trustee, pursuant to its direction.

E. CBI's Dissatisfaction with PPNA's Plan Administration.

After the Plan was implemented, CBI allegedly began experiencing problems with PPNA's administration of the Plan. In January 1987 CBI fired PPNA and replaced it with a new third-party administrator. 8th Cir. App. 75, 129. In June 1988, as part of a settlement agreement with CBI, NALAC paid the Plan $28,000 and further agreed to pay 25 percent of a statement for services from the successor Plan administrator. Id. at 266. In return, CBI released and discharged NALAC from all claims "arising out of . . . the 1985 sale, marketing and administration" of the Plan. Id. at 268. CBI then brought this suit against NYL for damages allegedly resulting from the same problems with the Plan's administration.

The district court granted NYL's motion for summary judgment. It held that CBI's state law claims were pre-empted by ERISA because they relate to the administration of the Plan. Pet. App. A-8. It also held that CBI had failed

to state a claim for breach of fiduciary duty under ERISA because CBI had failed to present any evidence that NYL was a fiduciary to the Plan. Id. at A-11.

The Court of Appeals for the Eighth Circuit, after a de novo review of the grant of summary judgment, affirmed. Id. at A-16. It, too, found that CBI's claims relate to the administration of the Plan, and that CBI had not presented any evidence that NYL was a Plan fiduciary. Id.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' RULING THAT ERISA PRE-EMPTS STATE LAW CLAIMS RELATED TO PLAN ADMINISTRATION EVEN IF NO ERISA REMEDY IS AVAILABLE IS CONSISTENT WITH THE RULINGS OF THIS COURT.

CBI argued before the Eighth Circuit Court of Appeals and the district court that its purported state law claims can only be pre-empted by ERISA if NYL is found to be a fiduciary under ERISA. Both courts rejected this contention, ruling that ERISA can pre-empt claims against nonfiduciaries because the availability of an ERISA remedy is not a requirement for ERISA pre-emption. CBI now contends these rulings were in error and that Supreme Court review is required because a conflict exists among the circuits on this issue.

CBI's petition should be denied because the Eighth Circuit correctly applied controlling Supreme Court precedent. Furthermore, CBI has failed to create an adequate factual record demonstrating that it lacked an ERISA remedy to make this an appropriate case for Supreme Court review.

A. Pilot Life Holds that an ERISA Remedy is Not Required for ERISA Pre-emption.

ERISA was intended by Congress to "establish pension plan regulation as exclusively a federal concern." Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 482 (1990) (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987)). To achieve this end, ERISA contains an express pre-emption provision. 29 U.S.C. § 1144(a). This Court has determined that ERISA's civil remedies scheme is exclusive. Pilot Life, 481 U.S. at 54-55. The express pre-emption provision pre-empts "any and all State laws insofar as they . . . relate to any employee benefit plan," 29 U.S.C. § 1144(a), (with certain exceptions not applicable here).[3]

Congress used the words "relate to" in their broad sense, rejecting more limited pre-emption language that would have made the clause applicable only to state laws concerning specific subjects covered by ERISA, such as fiduciary responsibility. FMC Corp. v. Holliday, 111 S. Ct. 403, 409 (1990); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98 (1983). Instead, the phrase "relates to" must be "construed expansively" and "given its broad common sense meaning," Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985), so that a state law "relates to" a benefit plan under ERISA's pre-emption provision "if it has a connection with or reference to such a plan." Pilot Life, 481 U.S. at 47 (quoting Metropolitan Life, 471 U.S. at 739); Ingersoll-Rand, 111 S. Ct. at 483.

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[3] State laws regulating insurance, banking and securities are exempt from pre-emption under ERISA's "savings" clause. 29 U.S.C. § 1144(b)(2)(A). CBI does not contend the savings clause applies. Furthermore, the parties agree CBI's plan is governed by ERISA. See 29 U.S.C. § 1002(2) (defining "pension plan").

In addition to ERISA's express pre-emption provision, this Court has held that ERISA's exclusive remedies provision, 29 U.S.C. § 1132(a), also has an implied pre-emptive effect. In Pilot Life the Court held that state law claims based on the improper processing of a claim for benefits were pre-empted based not only on ERISA's express pre-emption clause, but also on ERISA's civil remedies provision. 481 U.S. at 52-53. The Court held that the remedies contained in § 1132(a) were intended by Congress to be exclusive and that Congress "did not intend to authorize other remedies that it simply forgot to incorporate expressly." Id. at 54 (quoting Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985)).

Furthermore, the Court stated that ERISA's "pre-emptive force" was modeled after § 301 of the Labor-Management Relations Act of 1947 (the "LMRA"). 481 U.S. at 54. The Court emphasized that in so doing "Congress was well aware that the powerful pre-emptive force of . . . the LMRA displaced all state actions . . . even when the state action purported to authorize a remedy unavailable under the federal provision." Id. at 55 (emphasis added); see also Ingersoll-Rand, 111 S. Ct. at 485-86 (reaffirming that under Pilot Life ERISA displaces all state law claims regardless of whether ERISA provides a remedy). Thus ERISA, like the LMRA, need not provide a remedy to pre-empt state law.

The Eighth Circuit accordingly was correct when it held ERISA pre-empts CBI's purported state law claims despite the fact NYL is not an ERISA fiduciary. ERISA pre-empts any and all state law claims that "relate to" an ERISA plan, even if ERISA does not provide a remedy.

Virtually every circuit court that has addressed the issue has come to the same conclusion, as mandated by Pilot Life. See Smith v. Dunham-Bush, Inc., --- F.2d ---,

1992 WL 29049 (2d Cir. Feb. 7, 1992) ("the preclusion of remedy does not bar the operation of ERISA pre-emption"); Pane v. RCA Corp., 868 F.2d 631 (3d Cir. 1989) (state law claims pre-empted despite lack of ERISA remedy); Hansen v. Continental Ins. Co., 940 F.2d 971, 979 (5th Cir. 1991) ("ERISA's pre-emption provision bars state law causes of action even though such pre-emption may leave a [plaintiff] without a remedy"); Lister v. Stark, 890 F. 2d 941, 946 (7th Cir. 1989), cert. denied, 111 S. Ct. 579 (1990) ("the availability of a federal remedy is not a prerequisite for federal pre-emption"); Olson v. General Dynamics Corp., 951 F.2d 1123, 1127 (9th Cir. 1991) ("There is simply no reason to assume that Congress intended ERISA's pre-emptive reach to be coextensive with the Act's civil remedial scheme."); Straub v. Western Union Tel. Co., 851 F.2d 1262 (10th Cir. 1988) (ERISA pre-empts state law claims despite lack of ERISA remedy); Howard v. Parisian Inc., 807 F.2d 1560 (11th Cir. 1987) (state law claims against non-fiduciary plan administrator pre-empted); see also Gibson v. Prudential Ins. Co., 915 F.2d 414 (9th Cir. 1990) (ERISA pre-empts state law claims against nonfiduciaries despite lack of ERISA remedy); American Federation of Unions, Local 102 Health & Welfare Fund v. Equitable Life Assur. Soc'y, 841 F.2d 658 (5th Cir. 1988) (dismissing state law claims against insurance carrier on pre-emption grounds and dismissing ERISA claim because insurance carrier was not a fiduciary); Settles v. Golden Rule Ins. Co., 715 F. Supp. 1021, 1022 (D. Kan. 1989) (state law claims pre-empted even though defendant insurance company was not a fiduciary), aff'd, 927 F.2d 505 (10th Cir. 1991).[4]

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[4] Despite the holdings of the Fifth Circuit in Hansen and American Federation, CBI argues that the Fifth Circuit is not in accord with this majority view, citing Memorial Hosp. Sys. v. Northbrook Life Ins. Co., 904 F.2d 236 (5th Cir. 1990). Memorial held that a hospital which provided treatment to a patient based on the erroneous verification by her husband's employer that she was covered by (footnote cont'd)

Even the Sixth Circuit, which alone has erroneously held that ERISA pre-emption requires an ERISA remedy, see Perry v. P*I*E* Nationwide, Inc., 872 F.2d 157 (6th Cir. 1989), cert. denied, 493 U.S. 1093 (1990), has recently tacitly acknowledged the error of this conclusion.[5] In Cromwell v. Equicor-Equitable HCA Corp., 944 F.2d 1272 (6th Cir. 1991), the court held that state law claims were pre-empted because they related to an ERISA plan. In setting forth the scope of ERISA pre-emption, the Sixth Circuit correctly observed:

> Nor is it relevant to an analysis of the scope of federal pre-emption that appellants may be left without a remedy. Caterpillar Inc. v. Williams, 482 U.S. 386 . . . (1987).

944 F.2d at 1276.[6]

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an insurance policy (a "plan" under ERISA) could recover the cost of treatment from the employer and the insurance carrier under state law because "a cause of action based on such conduct would not relate to the terms or conditions of a welfare plan" or affect plan administration (contrary to CBI's claims). Id. at 250. The court did not hold that an ERISA remedy was required for ERISA preemption.

[5] The Sixth Circuit in Perry relied on the Eighth Circuit's pre-Pilot Life opinion in Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208 (8th Cir.), cert. denied, 454 U.S. 968 (1981), for the proposition that ERISA preempts state claims only where ERISA provides a remedy. 872 F.2d at 162. In rejecting CBI's contentions in this case, however, the Eighth Circuit held that Dependahl does not stand for this proposition. Pet. App. A-21. Perry is therefore not only contrary to Pilot Life, it is also based on an erroneous reading of Dependahl. See also International Resources v. New York Life Ins. Co., 950 F.2d 294, 298 (6th Cir. 1991) (stating that an ERISA remedy is required for pre-emption).

[6] In Caterpillar this Court reaffirmed that the LMRA preempts state law claims even where there is no federal remedy. Caterpillar Inc. v. Williams, 482 U.S. 386, 391 n.4 (1987).

The Sixth Circuit's failure to follow the dictates of Pilot Life is not at issue in this petition. The Sixth Circuit's erroneous interpretation of ERISA does not create a true conflict among the circuits, because the Supreme Court has spoken on this issue. The Eighth Circuit's ruling on this issue is correct and in accord with Pilot Life. Correcting the Sixth Circuit's erroneous view of ERISA pre-emption should take place on review of a Sixth Circuit decision.

CBI argues that Congress could not have intended to pre-empt its purported state law claims, because the purpose of ERISA is to protect plans and employees. This argument misses the mark. Congress decided that plan participants on the whole would best be served if plans were not subjected to potentially conflicting state laws, because of the inefficiencies that would result. See, e.g., Ingersoll-Rand, 111 S. Ct. at 485; FMC Corp. v. Holliday, 111 S. Ct. 403, 409 (1990). "To argue that Congress has created a 'gap' in the law does not undermine the reasoning on which a finding of pre-emption is based." Olson v. General Dynamics Corp., 951 F.2d 1123, 1128 (9th Cir. 1991) (quoting Phillips v. Amoco Oil Co., 799 F.2d 1464, 1470 (11th Cir. 1986), cert. denied, 481 U.S. 1016 (1987)). Any such "gap" results from Congress' policy decision to pre-empt state laws that do not regulate subject matters covered by ERISA, FMC Corp., 111 S. Ct. at 408, even if ERISA does not provide a remedy, Pilot Life, 481 U.S. at 55-56. CBI's argument is best addressed to Congress, not the courts.

B. The Factual Record Makes This an Inappropriate Case for Resolving the Alleged Conflict Between the Circuits.

Furthermore, CBI has failed to demonstrate, as a factual matter, that it had no ERISA remedy. All that has

been determined is that CBI has failed to state a claim against NYL for breach of fiduciary duty under ERISA. CBI may have had an ERISA remedy against NALAC for the damages CBI seeks in this suit, because CBI alleges NALAC was an ERISA fiduciary. Petition for Writ of Certiorari ("Petition") at 15. If CBI is correct, it may have been able to assert ERISA claims against NALAC. Instead, it chose to compromise its purported claims in a monetary settlement with NALAC. The settlement agreement provides that NALAC is compensating CBI for "losses claimed to have been sustained as a result of the marketing, sale and administration of the C.B.I., Inc. Pension Plan," (8th Cir. App. 266), i.e., the same alleged losses CBI seeks to recover from NYL in this case. Thus, CBI has not demonstrated, as a factual matter, that it lacked any remedy under ERISA for its purported claims. The lack of an adequate factual record makes this an inappropriate case for granting certiorari. See, e.g., United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

II. THE COURT OF APPEALS' RULING THAT CBI'S STATE LAW CLAIMS RELATE TO PLAN ADMINISTRATION IS BASED ON A FACTUAL REVIEW OF THE RECORD AND IS CONSISTENT WITH THIS COURT'S DECISIONS.

A. Certiorari is Inappropriate Because the Court of Appeals' Decision is Based on a Determination that CBI Failed to Make an Adequate Factual Showing under Fed. R. Civ. P. 56.

CBI argues that its purported state law claims are not pre-empted because they arose prior to the creation of the Plan, and that a conflict exists in the circuits as to pre-

emption of claims based on alleged pre-plan conduct. Even if such a conflict existed, CBI's petition does not adequately present this issue for review; the Court of Appeals found that CBI failed to show that its purported claims arose pre-plan, since they are based on allegedly improper plan administration. Discretionary review is inappropriate because no "special and important reasons" exist for reviewing this fact-based determination. See Johnston, 268 U.S at 227.

CBI does not, and cannot, dispute the well-settled principle that state law claims arising out of the administration of an ERISA plan "relate to" a plan and therefore are pre-empted. See Pilot Life, 481 U.S. at 57 (claim based on "improper processing of a claim for benefits" pre-empted); Shaw, 463 U.S at 105 & n.25 (ERISA pre-emption intended to preclude state interference in plan administration); Gibson v. Prudential Ins. Co., 915 F.2d 414, 416 (9th Cir. 1990) (pre-emption applies where "claims arise from the administration of [ERISA] plans whether directly or indirectly"); Jackson v. Martin Marietta Corp., 805 F.2d 1498, 1500 (11th Cir. 1986) (Congress intended "to preclude state law claims pertaining to the administration of employee benefit programs"); Scott v. Gulf Oil Corp., 754 F.2d 1499, 1505 (9th Cir. 1985) (pre-emption applies where "the conduct challenged by each claim was part of the administration of an employee benefit plan").[7]

> As this Court has explained, ERISA was intended to:
>
> establish a uniform administrative scheme, which provides a set of standard

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[7] ERISA pre-emption is not limited, however, to claims relating to plan administration. See, e.g., Ingersoll-Rand, 111 S. Ct. at 484 (rejecting argument that ERISA pre-emption applies only to "those state laws that affect plan terms, conditions, or administration").

> procedures to guide processing of claims and disbursement of benefits. . . . Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9-11 (1987).

Rather than disputing the principle that state law claims based on the improper administration of a plan are pre-empted, CBI argues that its claims relate to pre-plan representations because it was induced to buy an inherently defective turnkey plan that was destined to have administration problems. Thus, CBI argued below that its claims arose "independently of, and incidentally to, the administration of the plan." Appellant's Eighth Circuit Brief at 29.

The Court of Appeals rejected this argument, stating as follows:

> CBI's claims . . . arise directly from the administration of the plan. CBI attempts to argue that NYL should have foreseen these difficulties and thus its claims arose pre-plan and are not pre-empted. This assertion is simply not supported by the record. . . .

Pet. App. A-20-21 (emphasis added).

The Court of Appeals was correct: CBI's purported state law claims are based on alleged administration problems, not pre-plan conduct. As the district court aptly put it: "[T]he claims necessarily relate to errors in administration of the plan; otherwise, there would be no damages and thus no claims." Pet. App. A-8. The factual premise of CBI's

proposed issue for review was properly found lacking by the lower courts, and discretionary review by this Court would therefore be inappropriate.

B. Certiorari is Inappropriate Because the Court of Appeals' Decision that CBI's Claims Relate to a Plan is Correct Under Ingersoll-Rand.

Review of the Court of Appeals' decision would be inappropriate for the additional reason that it is correctly decided under Ingersoll-Rand. As an alternative basis for affirming the district court, the Court of Appeals properly rejected as untenable CBI's proposed distinction between pre-plan and post-plan conduct. The Court of Appeals held that regardless of when the alleged conduct took place, so long as the state law claims "relate to" the plan, they are pre-empted:

> Additionally, even if CBI's claims involved misrepresentation in the sale of the § 401(k) program, its claims still relate to the employee benefit plan. [Citations omitted]. Thus CBI's claims "relate to" an employee benefit plan and therefore are pre-empted.

Pet. App. A-21.[8]

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[8] The Court of Appeals cited Farlow v. Union Cent. Life Ins. Co., 874 F.2d 791 (11th Cir. 1989) and Childers v. Northwest Airlines, Inc., 688 F. Supp. 1357 (D. Minn. 1988). In Farlow, the court held that claims based on alleged misrepresentations about an ERISA plan were pre-empted, stating "[W]e reject the Farlows' contention that simply because their claims involve misconduct in the sale and implementation of the . . . plan, their claims do not relate to the plan." 874 F.2d at 794. In Childers, the plaintiffs argued their state law claims were not pre-empted because "they are founded on acts preliminary (footnote cont'd)

In Ingersoll-Rand, this Court held that state law claims based on allegations an employer terminated an employee to prevent him from becoming a plan participant so it could avoid making contributions to a pension plan "related to" the plan and were therefore pre-empted. This Court explained:

> [T]he existence of a pension plan is a critical factor in establishing liability under the State's wrongful discharge law. As a result, this cause of action relates not merely to pension benefits, but to the essence of the pension *plan* itself.
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> . . . .
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> . . . The Texas cause of action makes specific reference to, and indeed is premised on, the existence of a pension plan. . . . [I]n order to prevail, a plaintiff must plead, and the court must find, that an ERISA plan exists and the employer had a pension-defeating motive in terminating the employment. Because the court's inquiry must be directed to the plan, this judicially created cause of action "relate[s] to" an ERISA plan.

111 S. Ct. at 483 (emphasis added).

Ingersoll-Rand's holding demonstrates the Court of Appeals was correct in ruling that CBI's claims "relate to"

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to the adoption and creation of the ESOPs and, therefore, do not have any connection or reference to any employee benefit plan," (the very same argument offered by CBI). 688 F.Supp. at 1364. The court rejected the argument because "[s]uch claims are 'related to' a plan . . . in the 'broad common-sense meaning,' Shaw, 463 U.S. at 97, 103 S. Ct. at 2900, of that phrase and are, therefore, pre-empted by ERISA." Id.

a plan, and it precludes the simplistic distinction CBI seeks to draw between pre-plan and post-plan conduct. CBI's claims are premised on the allegation that it was induced to purchase a "turnkey program for operating a 401(k) plan." See Pet. App. A-35. As CBI puts it in its petition, "The crux of CBI's claims related to preplan misrepresentations and inducement to purchase a 401(k) program that had inherent defects." Petition at 14. Even accepting this contention as true, CBI's state law claims would still be pre-empted, because each claim "makes specific reference to, and indeed is premised on, the existence of a pension plan." Ingersoll-Rand, 111 S. Ct. at 483. CBI's claim that it bought a "defective" plan "relates to" a plan, as that phrase is construed under Ingersoll-Rand. Certiorari should be denied because the Court of Appeals' decision was consistent with Ingersoll-Rand, and the distinction CBI would have this Court draw is untenable.

III. RESOLUTION OF THE ALLEGED CONFLICT REGARDING NON-FIDUCIARY LIABILITY IS IRRELEVANT TO DISPOSITION OF THIS CASE BECAUSE THE COURT OF APPEALS ACCEPTED CBI'S POSITION FOR PURPOSES OF THIS APPEAL.

The final issue CBI seeks to have reviewed is whether a non-fiduciary can be liable under ERISA if it knowingly participates in a breach of fiduciary duty by an ERISA fiduciary. CBI contends certiorari should be granted because a conflict exists among the circuits on this issue. Regardless of whether such a conflict exists, CBI ignores the fact that this case does not even present the issue for resolution, for two reasons.

First, CBI did not properly preserve the issue for appeal. CBI did not assert this theory of relief before the

district court, and therefore it could not properly raise the issue for the first time on appeal. Moran v. Aetna Life Ins. Co., 872 F.2d 296, 300 (9th Cir. 1989); Tisdale v. Dobbs, 807 F.2d 734, 740 (8th Cir. 1986). In fact, CBI has not even pleaded such a claim in its complaint. See Pet. App. A-32-49.

Second, the Eighth Circuit did not even address this issue, because it found that CBI had failed to offer any evidence to support such a claim. The Court of Appeals held as follows:

> CBI asserts that NYL has non-fiduciary liability. Relying on Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629 (W.D. Wis. 1979) (Freund), CBI asserts that a person who knowingly participates in a breach of trust under ERISA can be held liable under ERISA even though not a fiduciary. This court expresses no opinion on the validity of non-fiduciary liability because even under the standards in Freund, CBI has not proven NYL is liable as a non-fiduciary. . . . CBI claims that NYL developed a defective § 401(k) plan in conjunction with NALAC and PPNA. The mere marketing of the § 401(k) plan does not implicate fiduciary conduct, nor has CBI proven that the 401(K) plan was actually defective, only that it was administered poorly. NYL was not involved in the administration of the plan or any breach of trust that may have occurred in the administration of the plan.

Pet. App. A-24 (emphasis added). Thus, the Court of Appeals assumed that CBI's position on this issue was

correct, that a non-fiduciary can be liable for participating in a breach of fiduciary duty. It did so despite the fact CBI failed to plead such a claim or raise the issue before the district court. Review of this issue is irrelevant to the disposition of this case, because the Court of Appeals decided the issue in CBI's favor for purposes of its appeal.

The Court of Appeals' decision that summary judgment was properly granted based on its review of the record does not raise an issue suitable for review by certiorari. See Johnston, 268 U.S. at 227. Furthermore, the Court of Appeals' decision was clearly correct. The conduct that CBI points to as NYL's participation in a breach of fiduciary duty under ERISA is NYL's alleged development and marketing of a "defective" turnkey plan. Petition at 16. Yet CBI contends that this very same conduct does not even "relate to" the Plan under ERISA. Petition at 13-14. The Court of Appeals properly concluded that CBI failed to show that NYL had knowingly participated in an ERISA fiduciary's breach of fiduciary duty to the Plan, even assuming such a cause of action existed.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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